Supreme Court, U.S.
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No. 99-___

In The

Supreme Court of the United States

TOWN BOARD OF THE TOWN OF HEMPSTEAD, NEW YORK, *et al.*,

Petitioners,

v.

DOROTHY GOOSBY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Since 1907, Republicans have won every election to the Town Board of Hempstead, which holds its elections under an at-large system. It is undisputed that the nonminority electorate of Hempstead exercises the franchise in a colorblind manner as black and white candidates of the same party receive an equal percentage of the white vote. Currently, one of the six Board members is a black Republican. Because black voters are overwhelmingly Democratic, and no Democratic candidate of either race has been successful, no "black preferred" candidate has ever been elected to the Board. The questions presented are:

1. Whether, contrary to the established approach in the First, Fifth and Eleventh Circuits, a court may find racial bloc voting or a violation of Section 2 of the Voting Rights Act where partisan affiliation, not race, causes minority-preferred candidates to lose in at-large elections and the nonminority electorate does not consider race.

2. Whether interpreting Section 2 to require the creation of a black majority, single-member district in a jurisdiction where the nonminority electorate had never discriminated against any minority or minority-preferred candidate violates the Constitution's equal protection guarantees.

3. Whether federal courts have the remedial authority to invalidate more of a race-neutral at-large system than is necessary to eliminate the allegedly dilutive effect of that system on minority voting strength.

PARTIES TO THE PROCEEDINGS

The petitioners are the Town Board of the Town of Hempstead, New York, Gregory P. Peterson, Richard V. Guardino, Patrick A. Zagarino, Curtis Fisher, Joseph Ra, Anthony Santino and Joseph Kearney, in their official capacities as members of the Town Board of the Town of Hempstead, and the Nassau County Board of Elections, John Degrace and Steven Sabbath, in their official capacities as Commissioners of Elections of Nassau County.

The respondents are Dorothy Goosby, Samuel Prioleau, Xavier Morales, and Miladys Morales.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
1. The District Court Proceedings	3
2. The Court of Appeals' Decision	7
REASONS FOR GRANTING THE WRIT	8
I. There Is A Sharp Conflict Among The Circuits As To Whether A Finding of Racially Motivated Voting Is Required To Violate Section 2	13
II. The Second Circuit's Interpretation Of Section 2 Is Inconsistent With This Court's Precedents	22
III. The Second Circuit's Interpretation Of Section 2 Renders That Statute Unconstitutional	26
IV. The Remedy Imposed By The Court Below Exceeds The Scope Of Federal Judicial Authority	28
CONCLUSION	30

TABLE OF AUTHORITIES

Page

CASES

Abrams v. Johnson, 521 U.S. 74 (1997) 24

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) 26

Askew v. City of Rome, 127 F.3d 1355 (11th Cir. 1997) 16

Baird v. City of Indianapolis, 976 F.2d 357 (7th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993) 14

Bush v. Vera, 517 U.S. 952 (1996) 12

Chisom v. Roemer, 501 U.S. 380 (1991) 20

City of Boerne v. Flores, 521 U.S. 507 (1997) 27

City of Mobile v. Bolden, 446 U.S. 55 (1980) 10, 25

Clarke v. City of Cincinnati, 40 F.3d 807 (6th Cir. 1994), *cert. denied*, 514 U.S. 1109 (1995) 14

City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989) 26

Edward J. De Bartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) 27

Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ., No. 89-230-LON, 1996 U.S. Dist. LEXIS 4747 (D. Del. Apr. 10, 1996) 15

Johnson v. De Grandy, 512 U.S. 997 (1994) 7, 10, 19, 20, 25, 26

Johnson v. Mortham, 926 F. Supp. 1460 (N.D. Fla. 1996) 15

Katzenbach v. Morgan, 384 U.S. 641 (1966) 27

TABLE OF AUTHORITIES – Continued

Page

League of United Latin Am. Citizens, Council No. 4434 v. Clements, 999 F.2d 831 (5th Cir. 1993) (*en banc*), *cert. denied*, 510 U.S. 1071 (1994) 13, 14, 15, 16, 17, 18

Lewis v. Alamance County, 99 F.3d 600 (4th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997) 12, 14, 17

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) 26

Miller v. Johnson, 515 U.S. 900 (1995) 27

Milliken v. Bradley, 433 U.S. 267 (1977) 29

Milwaukee Branch of the NAACP v. Thompson, 116 F.3d 1194 (7th Cir. 1997) 24

Nipper v. Smith, 39 F.3d 1494 (11th Cir. 1994) (*en banc*), *cert. denied*, 514 U.S. 1083 (1995) 13, 15, 16, 17, 18, 25

Shaw v. Reno, 509 U.S. 630 (1993) 11, 26, 27, 30

Smith v. Clinton, 687 F. Supp. 1310 (E.D. Ark. 1988) 9

Southern Christian Leadership Conference v. Sessions, 56 F.3d 1281 (11th Cir. 1995) (*en banc*) 16

St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) 19

Thornburg v. Gingles, 478 U.S. 30 (1986) ..... *passim*

United States Postal Serv. Bd. v. Aikens, 460 U.S. 711 (1983) 19

University of California Regents v. Bakke, 438 U.S. 265 (1978) 26

Uno v. City of Holyoke, 72 F.3d 973 (1st Cir. 1995) .... *passim*

TABLE OF AUTHORITIES – Continued

Page

Upham v. Seamon, 456 U.S. 37 (1982) 29

Voinovich v. Quilter, 507 U.S. 146 (1993) 29

Whitcomb v. Chavis, 403 U.S. 124 (1971) 9, 10, 23, 24, 29

White v. Regester, 412 U.S. 755 (1973) 24

White v. Weiser, 412 U.S. 783 (1973) 29

Wright v. Rockefeller, 376 U.S. 52 (1964) 27

CONSTITUTION, STATUTES AND RULES

U.S. CONST. amend. XIV, § 1 1

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1973..... 1, 3, 9, 10, 20, 25

LEGISLATIVE MATERIALS

S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982)..... 4

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the decision of the Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Second Circuit for which review is sought is reported at 180 F.3d 476 and is reprinted in the appendix hereto ("App.") at App. 1. The opinions of the United States District Court for the Eastern District of New York are reported at 956 F. Supp. 326 and 981 F. Supp. 751 and are reprinted herein at App. 57 and App. 135, respectively.

JURISDICTION

The judgment of the Second Circuit was entered on June 25, 1999. A petition for review and suggestion for rehearing *en banc* was timely filed and denied on September 8, 1999. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 2 of the Voting Rights Act of 1965, as amended June 29, 1982, is codified at 42 U.S.C. § 1973 and is reprinted at App. 174.

The Equal Protection Cause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

The Town of Hempstead, located in Long Island, New York, is governed by a Board comprised of, among others, six

Councilmembers.[1] The members of the Board are elected from an at-large district comprising the entire Town and serve terms of four years. As the terms are staggered, elections for the Board are held every two years for three seats.

As the district court noted, "[t]he Republican Party has had a lock on Town-wide elections since the inception of Town government. Indeed, since 1907, the victor of every Town-wide election has been a Republican." App. 68. Thus, the dispositive factor in every election held for Councilmember has been the partisan affiliation of the candidate.

The population of Hempstead is 83% white and 12.1% black. App. 64. Among black voters in Hempstead, 68% are registered Democrats and 22% are registered Republicans. App. 109. Among white voters in Hempstead, 51% are registered Republicans and 26% are registered Democrats. App. 109. Overall, 48.6% of the Town's residents are registered Republicans, 29.6% are registered Democrats, and 21.8% are either registered in other parties or expressed no party affiliation. App. 9.

The election results for Councilmembers unequivocally demonstrate that race plays no role in the election of candidates to the Board. The irrelevance of the race of the candidates is evident in all of the six elections spanning 10 years considered by the courts below. App. 78-81. It is undisputed that black Democrats and white Democrats receive virtually identical support among the voters of Hempstead. *Respondents'* expert found that black Democrats on average received 28.44% of the white vote compared to white Democrats who on average received 29% of the white vote. App. 78-81.[2] Thus, the district court found that "Democratic candidates for Town Board, whether black or white, receive essentially equal levels of support. . . . " App. 128. It is also undisputed that white Republicans and black Republicans receive virtually

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[1] The Town Supervisor also serves on the Board, but the election procedures relating to that office are not at issue in the instant case.

[2] If the 1993 special election is included, black Democrats have received 29.97% of the white vote.

identical support among the voters of Hempstead – in 1993 the black Republican candidate received the most votes of any candidate and 50.1% of the white vote while the white Republicans received 50.0% of the white vote. App. 80. Thus, Hempstead is now represented by five white Republican Councilmembers and one black Republican Councilmember.

The black residents of Hempstead, as noted, are overwhelmingly Democratic and "vote cohesively for the Democratic candidates." App. 72. In light of the ascendancy of the Republican Party, candidates supported by a majority of blacks have never won an election to the Town Board. Yet, as the foregoing demonstrates, the losses suffered by minority-preferred candidates are attributable *solely* to the partisan affiliation of the electorate, not to any racial animus.

1. The District Court Proceedings

Respondents, representing a class of all the eligible black voters residing in the Town of Hempstead, challenged the at-large election district for the Town Board under Section 2 of the Voting Rights Act. 42 U.S.C. § 1973. The district court analyzed respondents' claim under the rubric established by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and focused on whether the white majority had " 'vot[ed] sufficiently as a bloc to enable it, in the absence of special circumstances, to defeat the minority's preferred candidate.' " App. 60 (citing *Gingles*, 478 U.S. at 50-51). Both parties' experts, using standard regression analyses, agreed that most white voters supported Republican candidates and that most black voters supported Democratic candidates. App. 81. As noted, both experts' findings also showed that minority candidates of both parties received the same support as non-minority candidates. Additionally, respondents' expert candidly conceded that "[o]ne cannot help but notice, of course, that the racial polarization apparent in these elections is associated with a form of partisan polarization," App. 81, and the district court found "there is a strong correlation between political partisanship and the voting behavior of blacks and whites in the Town." App. 129. The district court

nonetheless concluded that respondents had demonstrated "racial bloc voting." This conclusion rested solely on its observation that blacks support black and white Democratic candidates and that no Democratic candidate has ever won an election. App. 118. There was no finding, however, that race played any role in the defeat of black-supported or black Democratic candidates or any disagreement with the undisputed fact that Hempstead consists of an electorate in which voters of each party voted without regard to the race of the candidates in their party. Nevertheless, expressly "disagree[ing]" with decisions of the Fifth and Eleventh Circuits, the court held as a matter of law that "the correlation between partisan politics and divergent voting patterns [cannot] be dispositive in a Section 2 case." App. 124.

Having found that the *Gingles* preconditions were satisfied, the district court went on to consider "whether, under the totality of the circumstances, the challenged practice impairs the ability of the minority voters to participate equally in the political process." App. 60. Specifically, the district court examined each of the factors set forth in the Senate Report accompanying the 1982 amendments to Section 2. App. 62-63 (citing S. Rep. No. 97-417, at 28-29 (1982) ("S. Rep."")). The district court's conclusion that Section 2 had been violated rested upon its findings relating to the Senate Report factors. First, the court considered the "history of official discrimination" in the Town. The court concluded that "[t]here has been no official policy of discrimination against blacks in the state or in the Town. Nor is there any basis to conclude that the Town's initial adoption of its at-large system, or its residents' 1967 decision to retain it, were motivated by racial animus." App. 82.[3] Second, the court found the "existence of racial

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[3] Nevertheless, the court assumed that a literacy test that was abandoned thirty years ago, at a time when the black population of Hempstead was less than 6%, "had a discriminatory impact on blacks," without any evidence concerning the racial makeup of those excluded by the test. App. 83. Additionally, the court found that a *state* law requiring the purging of voters that had not voted for four successive years had a

polarization" in Town Board elections because "[b]lacks support Democratic candidates [while] [w]hites support Republican candidates." App. 81. The court made clear that it was in no way suggesting that "the people in the Town of Hempstead are racially biased, or that they have resisted the steady integration of the Town." App. 122.[4] Third, the court concluded that the Town Board had been unresponsive to the "needs of the black communities in the Town." App. 94. The primary evidence of this indifference was that two of the Town's 2,500 employees had suffered racial discrimination and the Town's lack of an affirmative action policy. App. 101-103. The court also found that the at-large election policy was "tenuous" because blacks would be better served by a "Town Board member who is accountable to them" and the Town's contrary assertion "cannot be reconciled with the purpose or terms of Section 2." App. 106.

The district court also considered blacks' access to the candidate slating process in the Republican Party. As a threshold matter, the district court acknowledged that "[t]here are no impediments to blacks joining the Republican or Democratic Party in the Town. . . . " App. 86. The court also recognized that "both the Democratic and Republican clubs in the Town are multi-racial organizations and welcome membership and participation by interested blacks." App. 87. Blacks constitute 4% of the Republican party and an equal percentage of the executive party leaders in Nassau County. App. 10, App. 87. Thus, the court found that "[b]lacks are indeed welcome in the Republican Party. . . . " App. 121. After describing the formal process for gaining access to the Republican slate for Councilmembers, the court stated that the Chairman of the Nassau County Republican Party had *de*

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disparate impact on black voters, but agreed that the "facts preclude a finding that the purging evidences discriminatory intent on the part of the Town Board." App. 84.

[4] The court also noted that "blacks in the Town of Hempstead have fared well" as their household income is higher than that of whites in the United States and New York. App. 94.

facto control over the slating process as his recommendations had unanimously been supported by the party. It found that the Republican Party has "not been receptive" to slating black candidates for the Town Board. App. 89. It is undisputed that the black community first sought to have a black candidate placed on the Republican slate in 1993 and that a black Republican was placed on the ballot on that occasion. App. 90-91. Nevertheless, the district court concluded that this black candidate, who was the principal of a predominantly black high school in the Town's largest black community and had been Executive Assistant to the Town Board for four years, was "a 'safe' black Republican" because he was not recommended by the Nassau County African-American Republican Coalition ("AARC") and was close to the Republican Party Chairman. *See* Defendants' Proposed Findings of Fact at 13; App. 93. The court also discounted the testimony of the candidate supported by the AARC in 1993 that the "Republican Party is receptive to the recommendations of the AARC" and the undisputed fact that numerous black Republicans had been appointed and elected to important Town "policymaking positions," judgeships and village government positions within the Town. App. 92, 98.[5]

The court found a Section 2 violation on the basis of these Senate Report factors and its "racial polarization" analysis. As noted, the court did not require any showing that race, rather than partisan affiliation, affected any non-minority's vote, but said it was "simply among the many factors to be considered in determining whether, under the totality of the circumstances, an at-large scheme has impaired the ability of black voters in the Town to participate equally in Town Board elections." App. 124.

The district court specifically ordered the Town Board "to submit to the court a remedial plan that divides the Town into six single-member districts." App. 132. The Town sought

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[5] The court also noted that the Town Board had filled two vacancies on the Board in 1989 with white candidates after a "march on Town Hall by blacks" protesting the appointment of whites. App. 89.

to preserve the at-large system to the extent permitted by federal law and thus proposed that it be altered only to include the single-member black majority district proposed by respondents, with the remaining five council members elected at-large in the rest of the Town. The Town Board's alternate, less favored plan, consisted of six single-member districts with the same black majority district.

The district court held that the Town Board's proposal to preserve the remainder of the at-large system violated the Fourteenth Amendment because it impermissibly considered race and was not narrowly tailored to remedy the Section 2 violation. App. 154-55. In contrast, the Town Board's less favored six-district plan, with precisely the same black majority district, was nonetheless constitutional.

2. The Court of Appeals' Decision

The Second Circuit affirmed. Noting that petitioners had not contested the district court's findings as to the first and second *Gingles* factors, the Second Circuit's legal analysis focused on the requirement of a showing of racial bloc voting.[6] The court of appeals concluded that there was racial bloc voting, even though black candidates of both parties received the same support as their white counterparts, because (1) blacks support Democratic candidates and (2) Democratic candidates never win because the white majority supports Republican candidates. App. 30. As for petitioners' contention that "the divergent patterns are not attributable to race

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[6] In *Gingles*, the Court held that three "necessary preconditions," must be satisfied in order to demonstrate a violation of Section 2: "First, the minority group must be . . . sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." 478 U.S. at 50-51. These three preconditions are necessary, but not sufficient, to establish a Section 2 violation. *Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994).

but to partisan affiliation," the Second Circuit concluded that an "inquiry into the cause of white bloc voting is not relevant to a consideration of the *Gingles* preconditions." App. 30. Rather, the court of appeals "ratified" the district court's conclusion that the absence of any racially biased voting should merely be considered as one of the many Senate Report factors weighed under the totality of the circumstances inquiry. App. 31. When it eventually did consider the relevance of the fact that "blacks have lost as Democrats, not as 'blacks,' " the court found that blacks had less opportunity to elect their preferred candidates because blacks are "not able to elect preferred candidates under the Republican Party regime that rules in the Town" and "blacks should not be constrained to vote for Republicans who are not their preferred candidates." App. 36-37. In weighing the Senate Report factors, the Second Circuit relied principally on the district court's finding that blacks had not received equal access to the Republican slating process. App. 37. Judge Leval issued a decision concurring in the judgment.

REASONS FOR GRANTING THE WRIT

In direct conflict with three other federal circuit courts of appeal, the decision below squarely holds that the at-large system unlawfully diluted minority voting strength under Section 2 of the Voting Rights Act even though the minorities' electoral defeats were solely attributable to their affiliation with the less popular Democratic party, minority candidates concededly received precisely the same support as non-minority candidates of the same party and minorities had achieved extra-proportional representation on the governing body at issue. The court below reached this extraordinarily counterintuitive result only by erroneously conflating the entirely distinct issues of normal partisan politics and racially exclusionary electoral systems, in a manner forbidden by this Court's precedents and the language of Section 2. In doing so, the decision below both converts the concept of minority vote dilution into a "mere euphemism for political defeat at the

polls" and converts Section 2's guarantee of equal opportunity into a guarantee of preferential treatment and proportional representation. *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971).

There are two possible situations in which minority voters cannot successfully elect their preferred candidates in a political jurisdiction where nonminorities have a numerical majority. First, although minorities support the dominant party in the jurisdiction, they cannot elect their preferred candidates because nonminorities will not vote for minority candidates regardless of party affiliation. This denies minority voters an equal opportunity to elect their preferred candidates because, unlike white voters, they cannot elect preferred candidates of their race. Rather, "[c]andidates favored by blacks can win, but only if the candidates are white." *Smith v. Clinton*, 687 F. Supp. 1310, 1318 (E.D. Ark. 1988) (three-judge court). Consequently, although an at-large electoral system superficially provides minorities with equal access, this facially neutral procedure actually intersects with private, racially-motivated voting to deny them an opportunity to elect their preferred candidates, thus abridging their right to vote "on account of race." 42 U.S.C. § 1973.

The second situation in which minorities cannot elect their preferred candidate exists where, although the jurisdiction has an entirely colorblind electorate that provides equivalent levels of support to minority and nonminority candidates, minorities support the less popular party that is incapable of electing candidates of any race. Prior to the decision below, this Court and the lower federal courts had uniformly found that this latter situation did not constitute a racially discriminatory result under Section 2, but, rather, was a result inherent in a democratic system that properly grants victory to the most popular party. The court below nevertheless found such a dilutive result under Section 2 because the overwhelmingly Democratic black electorate "cannot elect their preferred candidate under the Republican Party regime that rules in the Town," even though black Republican and Democratic candidates receive support identical to those garnered by white Republican and Democratic candidates. App. 37. The court's

conclusion that an at-large system violates Section 2 when minority electoral losses are solely attributable to the partisan preferences of a colorblind white electorate is facially inconsistent with the plain language of Section 2, this Court's precedent and the decisions of at least three federal circuits, as well as any intelligible concept of *racial* bloc voting and *equal* opportunity in the electoral process.

Where black candidates of each party have the same support as their white counterparts and their defeat is attributable solely to their affiliation with the less popular party, minority voters have not suffered from any unequal electoral opportunity, much less any inequality "on account of race." 42 U.S.C. § 1973. Far from having "less opportunity" than others have, black voters in Hempstead have precisely the same opportunity as any white groups that support Democratic Party candidates, but both white and black Democrats have less opportunity than white and black Republicans do. The "disadvantaged" group in Hempstead is therefore not blacks, but Democrats, and this predominantly white group has less opportunity on account of political affiliation, not race. The lack of black electoral success in Hempstead is therefore purely a consequence of the normal operation of the democratic process – which grants victory to the most popular party – not any distortion of that process attributable to public or private voting discrimination.

Section 2, however, does not outlaw an at-large system where there is a colorblind electorate because it does not immunize minorities from the normal "*political* defeat at the polls," *Whitcomb*, 403 U.S. at 153 (emphasis added), suffered by any political minority or "from the obligation to pull, haul, and trade to find common political ground." *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994). Both *Whitcomb* – whose holding and analysis Section 2 is intended to codify – and *Johnson* make clear that Section 2 does not require such preferential treatment or otherwise prohibit at-large systems where "the Negro community's lack of success at the polls was the result of partisan politics, not racial vote dilution." *City of Mobile v. Bolden*, 446 U.S. 55, 109 (1980) (Marshall, J., dissenting). Even more directly, five members of the Court

in *Thornburg v. Gingles*, 478 U.S. 30 (1986), specifically considered and rejected any understanding of Section 2, or racial bloc voting under Section 2, that would establish a violation of that statute on the facts of this case, *i.e.*, where the minority-preferred candidates lose because a majority of the town is Republican, while most minorities are Democrats. *See* 478 U.S. at 83 (White, J., concurring); 478 U.S. at 100 (O'Connor, J., concurring).

Perhaps more important, the decision below is wholly irreconcilable with the rule in the First, Fifth and Eleventh Circuits that Section 2 plaintiffs must establish that the defeat of minority-preferred candidates is attributable to racially biased voting, rather than non-racial causes such as partisan affiliation. This must be done as part of the *prima facie* case in the Fifth Circuit or, in the First and Eleventh Circuits, as part of the ultimate vote dilution showing where, as here, the defendant has introduced some evidence suggesting that differential minority and majority voting patterns are attributable to non-racial considerations. Under the decision below, however, plaintiffs need never prove any racially motivated voting and may prevail even where, as here, it is undisputed that minority candidates received equal levels of support and their defeat was attributable to political affiliation.

It is particularly important for the Court to resolve this irreconcilable split on a fundamental voting rights question because, on the eve of a new census which will require redistricting in all jurisdictions, those jurisdictions and federal courts are in dire need of clear direction on the requirements of Section 2. They need such guidance both to achieve consistent application of this central civil rights issue and to intelligently assess whether potential Section 2 liability authorizes creation of majority-minority districts under the *Shaw v. Reno*, 509 U.S. 630 (1993), interpretation of the Fourteenth Amendment. Although compliance with Section 2 is arguably sufficient justification for the creation of majority-minority districts that would otherwise be forbidden by the Equal Protection Clause, jurisdictions cannot know whether they face such potential Section 2 liability if there is no agreement on the fundamental, threshold issue of whether

racially biased voting is a prerequisite to such liability. *See Bush v. Vera*, 517 U.S. 952, 992 (1996) (O'Connor, J., concurring). If the Court fails to establish a national standard on this basic question prior to redistricting, it will lead to wholly unnecessary and divisive litigation in the already extremely litigious redistricting process. Moreover, under the regime erected by the court below, jurisdictions where the racial minorities' preferred party is less popular may violate Section 2 even if it is stipulated that no majority voter has ever considered race and must "cure" this violation by creating a majority-minority district concededly drawn for purely racial purposes. Thus, the court below's erroneous interpretation of Section 2 is not only utterly standardless and manipulable, but also renders that statute unconstitutional by converting it into a law that discriminates on the basis of partisan affiliation and requires race-conscious balkanization of political jurisdictions even though there is no race-conscious voting to be "cured" through this "remedy."

Finally, even among the courts of appeals that require a showing of racially biased voting to establish Section 2 vote dilution, there is concededly disagreement and confusion over whether such a showing is a *prima facie* requirement under the third *Gingles* precondition or is part of the ultimate vote dilution inquiry. There is similar confusion over whether nonracial causes for lack of minority success *other than* partisan affiliation need to be considered and, if so, how.[7] Accordingly, it is important that the Court clarify the proper allocation of evidentiary and proof burdens in this area, as well as firmly establishing that Section 2 does not guarantee

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[7] *See, e.g., Uno v. City of Holyoke*, 72 F.3d 973, 981 (1st Cir. 1995) (noting that "controversy [over this issue] has raged since" *Gingles*); *Lewis v. Alamance County*, 99 F.3d 600, 615 n.12 (4th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997) (noting "disagreement [among the circuits] about the stage in the vote dilution inquiry in which causation evidence is appropriate"); App. 48 (Leval, J., concurring) ("The relevance of race-based intent to a violation of [Section 2] is especially unclear under the amended act.").

minorities proportional representation or preferential immunity from the normal vicissitudes of the democratic process.

I. There Is A Sharp Conflict Among The Circuits As To Whether A Finding of Racially Motivated Voting Is Required To Violate Section 2.

In this case, the Second Circuit held that an at-large voting system may violate Section 2 even if "the record indisputably proves that partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens in the [jurisdiction]." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993) (*en banc*) ("*LULAC*"), *cert. denied*, 510 U.S. 1071 (1994). This holding is directly at odds with the rule in at least three other federal circuits. All of those circuits quite sensibly require that Section 2 plaintiffs negate partisan politics as the explanation for the defeat of minority-preferred candidates. One circuit, the Fifth, requires Section 2 plaintiffs to "demonstrat[e] that 'race,' not . . . partisan affiliation, 'is the predominant determinant of political preference,' " in order to establish even a *prima facie* case under the "third prerequisite of *Gingles*" – *i.e.*, racial bloc voting by whites. *LULAC*, 999 F.2d at 855, 892 (citation omitted).

The First and Eleventh Circuits do not require plaintiffs to disprove nonracial explanations for divergent voting patterns in order to survive a directed verdict after their case in chief. They do, however, also impose on plaintiffs the "ultimate burden of persuading the factfinder that the voting patterns were engendered by race" if "the defendant proffers enough evidence to raise a legitimate question in regard to whether nonracial factors adequately explain racial voting patterns." *Uno*, 72 F.3d at 983. *See also Nipper v. Smith*, 39 F.3d 1494, 1524-25 (11th Cir. 1994) (*en banc*), *cert. denied*, 514 U.S. 1083 (1995). Other federal courts have not set forth specific rules governing the burden of proof, but have nonetheless rejected the court below's conclusion that the defeat of

minority-preferred Democratic candidates because of partisan affiliation may establish vote dilution under Section 2.[8]

The court below, in contrast, does not require any showing or finding of any racially-motivated voting in order to establish a Section 2 violation. Rather, the existence of racially-motivated white bloc voting is, at most, considered as one of the "Senate Report factors" – equivalent to district size and the responsiveness of elected officials – to be assessed in a wholly undefined and standardless balancing test under the "totality of circumstances." The Second Circuit's holding that at-large districts can somehow provide minorities with "less opportunity" "on account of race" absent any finding that a single nonminority voter considered race is thus irreconcilable with these decisions of the other circuit courts of appeals.

In *LULAC*, the Fifth Circuit held that there is no racial bloc voting under Section 2 when minority "[e]lectoral losses . . . are attributable to partisan politics." 999 F.2d at 863. Specifically, the court held that plaintiffs have "not established the third prerequisite of *Gingles*" – *i.e.*, white bloc voting – where "partisan affiliation, not race, caused the defeat of the minority-preferred candidates." *Id.* at 891-92. The court held that there could be no "racial bloc voting as

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[8] *See, e.g., Baird v. City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993) (upholding use of at-large districts notwithstanding consistent losses of minority-preferred Democrat candidates because the "Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates"); *Clarke v. City of Cincinnati*, 40 F.3d 807, 812 (6th Cir. 1994), *cert. denied*, 514 U.S. 1109 (1995) ("When, in the competition inherent in the democratic process, a racial group's preferred candidates are defeated despite the ability of its members to participate fully in that process, the Voting Rights Act should not provide that group with a remedy which is unavailable to other supporters of defeated candidates."); *Lewis*, 99 F.3d at 617 ("The [Voting Rights] Act's purpose is not to ensure the election of candidates of the minority's race, nor is it to ensure the election of candidates of any particular political party.").

required by *Gingles*" in counties where, as in this case, "[w]hite voters' support for black Republican candidates was equal to or greater than their support for white Republicans [and] black and white Democratic candidates received equal percentages of the white vote." *Id.* at 879. Accordingly, the Fifth Circuit reversed a district court decision embracing the Second Circuit's view of racial bloc voting and upheld at-large judicial elections.[9]

Thus, while the Fifth Circuit requires that plaintiffs demonstrate that race, rather than partisan affiliation, was the factor that caused the defeat of minority preferred candidates as part of the racial bloc voting showing necessary to establish a *prima facie* case, the Second Circuit does not require any such evidence at any stage of the Section 2 litigation. The court below forthrightly acknowledged that, in contrast to *LULAC*, it was not requiring that plaintiffs make such a showing as part of the threshold demonstration required under *Gingles*: "the cause of white bloc voting is not relevant to a consideration of the *Gingles* preconditions." App. 30.

The First Circuit's decision in *Uno* also holds that Section 2 plaintiffs "cannot prevail on a VRA § 2 claim if there is significantly probative evidence that whites voted as a bloc for reasons wholly unrelated to racial animus." *Uno*, 72 F.3d at 981. In *Nipper*, similarly, the Eleventh Circuit held that

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[9] Three-judge courts and district courts have reached a similar conclusion. *See, e.g., Jenkins v. Red Clay Bd. Ed.*, 1996 U.S. Dist. LEXIS 4747, *8 n.2 (D. Del. 1996) ("This court agrees with the concurring justices in *Gingles* that the reasons for the rejection of black candidates [are] relevant, and the court elects to analyze the issue as part of the inquiry into whether white bloc voting is sufficient usually to defeat the minority-preferred candidate."), *aff'd*, 116 F.3d 685 (3d Cir. 1997); *Johnson v. Mortham*, 926 F. Supp. 1460, 1475 (N.D. Fla. 1996) (three-judge court) (holding that there was no strong basis in evidence of white racial bloc voting in part because any "polarization may be a collateral effect of the fact that voters in northeast Florida are ideologically polarized along political party lines").

"[t]he existence of some form of racial discrimination therefore remains the cornerstone of section 2 claims; to be actionable, a deprivation of the minority group's right to equal participation in the political process must be on account of . . . race or color, not on account of some other racially neutral cause." 39 F.3d at 1515. Thus, "to establish a case of liability under section 2's results test, a plaintiff must demonstrate, under the totality of circumstances, that the voting community is driven by racial bias and that the challenged electoral scheme allows that bias to dilute the voting power of the minority group the plaintiff represents." *Id.* at 1546. *See also Southern Christian Leadership Conference v. Sessions*, 56 F.3d 1281, 1293-94 (11th Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 1045 (1996) ("*SCLC*") (finding no Section 2 violation because "factors other than race, such as party politics and availability of qualified candidates, were driving the election results and [ ] racially polarized voting did not leave minorities with 'less opportunity than other members of the electorate . . . ' ") (citation omitted).[10]

Unlike *LULAC*, the courts in *Uno* and *Nipper* did not require that plaintiffs disprove nonracial explanations for divergent voting patterns as part of the three *Gingles* factors necessary to establish a *prima facie* case. Rather, "Section 2 plaintiffs must demonstrate" racially motivated voting only if the "defendant present[s] evidence of the lack of racial bias in

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[10] The precedential effect of the lead opinion in *Nipper* is unclear because, although a majority of judges concurred in the opinion, the section of the opinion that addressed the legal significance of voting results attributable to partisan affiliation was specifically joined by only one other member of the *en banc* court. 39 F.3d at 1547. Subsequently, however, a majority of the *en banc* Eleventh Circuit in *SCLC* held that racial bloc voting is not established where racial polarization is due to "factors other than race, such as party politics and availability of qualified candidates." 56 F.3d at 1293. *See also Askew v. City of Rome*, 127 F.3d 1355, 1382 (11th Cir. 1997) (affirming district court opinion holding that " 'race' must play a role in the defeat of black-preferred candidates before the Voting Rights Act is violated, but racism in the electorate is only one of several roles that race may play.").

the voting community." *Id.* at 1524 & n.61. *See Uno*, 72 F.3d at 983 ("Inference [of] racial bias" created by *Gingles*' preconditions "will endure unless and until the defendant adduces credible evidence tending to prove that detected voting patterns can most logically be explained by factors unconnected to the intersection of race with the electoral system."). Once defendants have met this "burden of production," the "ultimate burden of persuading the factfinder that the voting patterns were engendered by race rests with the plaintiffs." *Id.* at 983. *See Nipper*, 39 F.3d at 1524 n.61 ("The burden of proving vote dilution under the totality of circumstances remains with the plaintiff."). In all three circuits, then, plaintiffs must disprove, by a preponderance of the evidence, that partisanship is a nonracial explanation for a minority's lack of electoral success. The only difference is the stage of litigation at which such proof of causation is required.[11] *See Lewis*, 99 F.3d at 615 n.12.

In the decision below, however, the court found unlawful Section 2 vote dilution even though it was conclusively proven and undisputed that a majority of the electorate voted against black Democratic candidates (like white Democratic candidates) because of partisan affiliation, not because of racial bias. Thus, it found Section 2 vote dilution and racial

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[11] These somewhat divergent approaches may be explained by the fact that the elections at issue in *Uno* and *Nipper* were nonpartisan, while those in *LULAC*, as here, were partisan. Accordingly, in *Uno* and *Nipper* the most obvious and objectively verifiable nonracial explanation for divergent voting patterns between the races – the different political affiliation of the races – was not available as an explanatory factor. This necessitated the more complicated inquiry into whether nonracial factors *other than* partisanship explained the lack of success by minority candidates; for example, "organizational disarray, lack of funds, want of campaign experience, the unattractiveness of particular candidates, or the universal popularity of an opponent." *Uno*, 72 F.3d at 983 n.4. *LULAC* noted that it was not determining "whether defendants may attempt to prove that losses by minority-preferred candidates are attributable to nonracial causes other than partisan affiliation." 999 F.2d at 860 n.27. *See also Nipper*, 39 F.3d at 1525 n.63.

bloc voting notwithstanding the express finding that there was a "strong correlation between political partisanship in the voting behavior of blacks and whites in the Town" because "Democratic candidates . . . , whether black or white, receive essentially equal levels of support, and . . . the one black Republican candidate . . . received essentially the same support from white voters as did the white Republican candidates." App. 128. Even though "blacks have lost as Democrats, not as 'blacks,' " the court found that blacks had less opportunity to elect their preferred candidates because blacks are "not able to elect preferred candidates under the Republican Party regime that rules in the Town" and "blacks should not be constrained to vote for Republicans who are not their preferred candidates." App. 37.

As noted, in so ruling, the court expressly disagreed with *LULAC's* holding that plaintiffs must disprove partisan affiliation as an explanatory factor to establish the third *Gingles* precondition of racial bloc voting.[12] The court below sought to paper over its disagreement with the First and Eleventh Circuits by suggesting that it, like those circuits, was considering nonracial explanations for a minority's lack of success as part of the "totality of circumstances" inquiry. The critical difference, of course, is that *Uno* and *Nipper* required a finding of racially biased voting as an essential predicate to establish a Section 2 violation (if this issue is contested by defendants) while the decision below clearly held that such a violation could be established *in the face of* a finding that nonracial factors, such as partisan affiliation, led to divergent voting patterns. Unlike *Uno* and *Nipper*, racial bloc voting is

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[12] Indeed, the Second Circuit completely reverses the ruling in *LULAC*. In *LULAC*, the Fifth Circuit held that the absence of racially-motivated *slating* of candidates could *refute* a Section 2 violation under the "totality of circumstances," even where "plaintiffs have met the *Gingles* threshold by showing racial bloc voting." 999 F.2d at 879. The decision below, in contrast, holds that racially-motivated Republican slating *establishes* a Section 2 violation under the "totality of circumstances," even if there is *no* evidence of racial bloc *voting* as defined in *LULAC* – *i.e.*, voting motivated by race, rather than political affiliation.

not the *sine qua non* of a Section 2 violation, but simply one of the multitude of "Senate Report factors" – such as minorities' socio-economic status – to be balanced in some undefinable manner. In other words, the First and Eleventh Circuits, following this Court's terminology, said racially motivated voting could be shown by plaintiffs at the "totality of circumstances" *stage* of the ultimate Section 2 vote dilution inquiry, as opposed to being part of the plaintiff's *prima facie* showing of the three *Gingles* threshold factors.[13] The Second Circuit imposed no such requirement at any stage and thus granted plaintiffs a favorable judgment they plainly would have been denied in the First, Fifth and Eleventh Circuits.

The Second Circuit's application of this standard even more clearly reveals the depth of its error and the extent of its irreconcilable conflict with the other circuits. The court below held that the at-large system diluted minority votes, although there was not a scintilla of evidence that any white voter considered race in any way, principally because the Republican Party in the Town purportedly violated one of the Senate Report factors – lack of access by blacks to the Republican Party's slating process. *See* S. Rep. at 29. As noted, this approach cannot be reconciled with other circuits because those circuits correctly require a finding of racially biased *voting* as the *sine qua non* of a Section 2 vote dilution claim, while the court below will rule for Section 2 plaintiffs absent any such finding, on the basis of "racially biased" *slating* of candidates. The Second Circuit's approach is also plainly wrong, particularly as applied to allegedly unequal slating by the *Republican* Party.

A determination that an at-large system violates Section 2 must be premised on a finding that the *at-large system* dilutes minority *voting* strength. It makes no sense to strike down an at-large system that does *not* dilute minority voting strength, or *uphold* one that is dilutive, based on a Republican

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[13] *See Johnson*, 512 U.S. at 1011; *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993); *United States Postal Serv. Bd. v. Aikens*, 460 U.S. 711, 714-15 (1983).

slating process that can neither exacerbate nor ameliorate any dilutive injury caused by the at-large system. Here, the Republican slating process was not the electoral system challenged by plaintiffs, had nothing to do with the vote dilution allegedly caused by that at-large system, could not possibly affect black voters' ability to elect their preferred *Democratic* candidates and that slating process was wholly unaffected by the remedy converting the at-large system to a single-member scheme. Thus, the Republican slating process, whatever its deficiencies, cannot cause minority vote dilution and therefore cannot serve as a basis for striking down an at-large system that allegedly dilutes minority votes. Consequently, as this Court's precedent plainly establishes,[14] the other circuits are entirely correct that a multimember electoral scheme cannot violate Section 2 absent unlawful *voting* (however defined), and it was manifest error for the Second Circuit to

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[14] *Gingles* plainly held that if "difficulty in electing and white bloc *voting* are not proved, minority voters have not established that the multimember structure interferes with their ability to elect their preferred candidates." 478 U.S. at 51 n.15 (emphasis added). Thus, if there is no legally significant white bloc voting, an at-large electoral structure cannot violate Section 2, even if a plaintiff can prove all of the other Senate Report factors, such as unequal slating of candidates. *See id.* Rather, unequal slating and other factors not directly related to voting patterns are subsidiary questions, to be examined only after white bloc voting is established, in order to determine "whether minority voters have an equal opportunity, *in spite of racial polarization*, 'to participate in the political process and to elect representatives of their choice.' " *Johnson*, 512 U.S. at 1020 (emphasis added) (citation omitted). Moreover, the Court has emphasized that plaintiffs must establish that minorities have *both* less "opportunity than other members of the electorate to participate in the political process *and* to elect representatives of their choice." 42 U.S.C. §1973(b) (emphasis added). *See Chisom v. Roemer*, 501 U.S. 380, 397 (1991) ("[I]t would distort the plain meaning of the sentence to substitute the word 'or' for the word 'and.' "). Showing of disadvantage in the political *slating* process obviously cannot establish that the "challenged electoral mechanism impairs [minorities] ability 'to *elect*.' " 478 U.S. at 51 n.15 (quoting Section 2(b)) (emphasis added).

strike down such a system because of allegedly discriminatory *slating* of Republican candidates (or the presence of any of the other Senate Report factors).

This is particularly obvious where, as here, the allegedly exclusionary party is not the party of minority-preferred candidates. The alleged paucity of black *Republican* candidates cannot possibly deny blacks the "ability to elect *their* preferred [Democratic] candidates." *Gingles*, 478 U.S. at 48. Accordingly, since minority voters would not "possess the potential to elect representatives in the absence of [unequal Republican slating], they cannot claim to have been injured by that structure or practice." *Id.* at 51 n.17. Yet the court below found that unequal *Republican* slating not only "injured" minority voters of the *Democratic* Party, but was the dispositive factor in finding that the *at-large system* harmed black Democratic *voting* strength.

This is an especially bizarre ruling because the elimination of the at-large system would have no effect at all on Republican slating process or increase black representation in the Republican Party. To the contrary, the only effect of creating a black majority district is to ensure that a Board which currently has one black *Republican* representative (out of 6) will have one black (or white) *Democratic* representative – which retards, rather than advances, the interests of black Republicans in electing *their* chosen candidates. App. 98, 116.

In sum, if "white bloc voting" encompasses only racially-motivated voting (but not colorblind partisan voting), then there is no basis for finding that the at-large system dilutes the minority's political or voting strength, or violates Section 2. Thus, the Second Circuit's invalidation of the at-large system on the basis of "factors" having nothing to do with minority *voting* strength is plain error, and in direct conflict with three other circuits.[15]

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[15] All the factors cited by the courts below for their finding that blacks are somehow excluded from the electoral process say nothing about actual voting patterns and only one even arguably relates to the voting

II. The Second Circuit's Interpretation Of Section 2 Is Inconsistent With This Court's Precedents.

This Court has consistently distinguished between losses suffered by minority-preferred candidates that are attributable to political affiliation – which reflect traditional democratic processes and equal treatment of minorities – and losses that are attributable to racially discriminatory voting – which is a distortion of democracy and deprives minorities of an equal opportunity to participate in the electoral process.

In *Gingles*, Justice Brennan's plurality opinion maintained that racial bloc voting could be established without regard to the race or partisan affiliation of the minority-preferred candidate, or other potential causes of differences in voting patterns between whites and blacks. 478 U.S. at 63. Under this view, as long as blacks and whites vote differently, and black-preferred candidates lose, the third *Gingles* precondition – white bloc voting – could be established. This is the essence of the ruling adopted by the Second Circuit. Justice White, who joined the other sections of Justice Brennan's opinion, expressly rejected this interpretation:

> I do not agree [with the plurality's view]. Suppose an eight-member multimember district that is 60% white and 40% black, the blacks being geographically located so that two safe black single-member districts could be drawn. Suppose further there are six white and two black Democrats running against

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process – *i.e.*, the alleged "use of racial appeals in political campaigns." App. 41 (quoting 956 F. Supp. at 355). But the single "racial" appeal cited in a Town Board election – which even the district court conceded was "subject to different interpretations" – did not result in racially biased voting since the candidate allegedly using this appeal received *more* black support than all but one Republican candidate in any election analyzed (27.3%) and the black Democrat candidate in that race received the same level of support as white Democratic candidates. App. 78-80; *see also* App. 95-97. Moreover, *Gingles* expressly noted that, even if minority voters "prove . . . that appeals to racial bias are employed in election campaigns . . . they have not demonstrated a substantial inability to elect caused by the use of a multimember district." *Gingles*, 478 U.S. at 50 n.15.

> six white and two black Republicans. Under Justice Brennan's test, there would be polarized voting and a likely § 2 violation if all the Republicans, including the two blacks, are elected, and 80% of the blacks in the predominantly black areas vote Democratic. . . . This is interest-group politics rather than a rule hedging against racial discrimination. I doubt that this is what Congress had in mind in amending § 2 as it did, and it seems quite at odds with the discussion in *Whitcomb v. Chavis*, 403 U.S. 124, 149-160 (1971).

478 U.S. at 83 (White, J., concurring). Justice White's hypothetical is this very case and his opinion plainly states that the defeat of black Democratic candidates in a Republican district because of partisan affiliation cannot establish *racial* bloc voting under the third *Gingles* precondition. Justice O'Connor, joined by three other members of this Court, expressly concurred with Justice White's "racially polarized voting" analysis and found that the plurality's view "conflicts with *Whitcomb*," which clearly held that minority vote dilution did not encompass minority losses attributable to partisan politics. *Id.* at 100 (O'Connor, J., concurring). Thus five members of the *Gingles* Court expressly disavowed the interpretation of racial bloc voting embraced by the Second Circuit. *Id.*[16]

As Justice White's and O'Connor's opinions reflect, the *Whitcomb* Court made clear that a claim of vote dilution is not established where the defeat of a minority-preferred candidate is attributable to partisan affiliation. In that case, the Court

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[16] In addition to embracing Justice White's and *Whitcomb*'s view that there is no racial bloc voting where minority candidates receive the same support as nonminority candidates of the same party, Justice O'Connor also concluded that the "reasons why white voters reject minority candidates" would "affect the overall vote dilution inquiry." 478 U.S. at 100 (O'Connor, J., concurring). Thus, like the lower court decisions discussed above, Justice O'Connor's opinion would apparently treat disproof of the partisan affiliation explanation as part of the plaintiffs' threshold racial bloc voting showing, while leaving potentially explanatory factors other than partisan affiliation to the overall vote dilution inquiry, after that *prima facie* case had been established. *See supra* note 11.

observed that "ghetto" residents "vote[d] predominantly Democratic" but their preferred candidate was usually rejected by the Republican majority in Marion County. 403 U.S. at 153. The Court concluded: "The voting power of ghetto residents may have been 'cancelled out' . . . but this seems a mere euphemism for political defeat at the polls." *Id.* The Court reasoned that there had been no vote dilution of racial minorities' voting strength as "poor Negroes of the ghetto [are not] any more underrepresented than poor ghetto whites who also voted Democratic and lost." *Id.* at 154. *See also White v. Regester*, 412 U.S. 755, 765-66 (1973); *Johnson*, 512 U.S. at 1020 (Section 2 was never intended to "immun[ize] [minorities] from the obligation to pull, haul, and trade to find common political ground."). It is clear that Section 2 "codif[ied] the 'results' test employed . . . in *Whitcomb* . . . and *White*." 478 U.S. at 83 (O'Connor, J., concurring). More recently, in *Abrams v. Johnson*, 521 U.S. 74 (1997), the Court found that minorities had not "established" the "third *Gingles* factor[ ] – the extent of racially polarized voting" – because there was a "general willingness of white voters to vote for black candidates," albeit to a lesser extent than they voted for white candidates. *Id.* at 93 (internal quotations omitted). Here, since white voters supported both Democratic and Republican black candidates to the *same* extent as white candidates of those parties, there also can be no racial bloc voting under *Gingles*. *See Milwaukee Branch of the NAACP v. Thompson*, 116 F.3d 1194, 1198 (7th Cir. 1997) (White support for black candidates defeats showing of white bloc voting under *Gingles* because such crossover voting "exceed[ed] the levels" of white support in *Abrams*.). As *Abrams* and the *Gingles* concurrences recognize, if minority candidates receive the same support as their white counterparts, there is no improper *racial* bloc voting by whites, but only perfectly proper *partisan* bloc voting by blacks and whites.

This result is also compelled by the language of Section 2, which prohibits giving minority voters "less opportunity"

"on account of race."[17] 42 U.S.C. § 1973. Where, as here, the determinant of electoral success is a candidate's political affiliation, not his race, there is no basis to say that black voters or candidates have less opportunity than their white counterparts or that any lack of success is "on account of race." Since Hempstead has no "racial and ethnic cleavages" in its electorate – only partisan cleavages – it has already achieved Section 2's ideal of all candidates being judged on their merits, rather than their skin color. *Johnson*, 512 U.S. at 1020. If, as the lower court held, Section 2 nonetheless guarantees black Democrats a level of success and representation on the Board *superior* to their white counterparts, as well as a racially-drawn district designed to guarantee precisely that success, then that statute has been converted into a guarantee of preferential treatment and proportional representation – a result directly foreclosed by the statute's plain language. *See Gingles*, 478 U.S. at 84 (O'Connor, J., concurring); *Uno*, 72 F.3d at 982; *Nipper*, 39 F.3d at 1516. It is also a result, as we presently discuss, that would render Section 2 unconstitutional.[18]

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[17] Of course, plaintiffs need not show that the challenged election procedure was intentionally *designed* to abridge minority votes "on account of race." *Cf. City of Mobile v. Bolden*, 446 U.S. 55 (1980). But it is necessary to show that this procedure "results" in such racially-based inequality by virtue of racially biased voting. In the absence of both public *and* private voting discrimination, any voting losses suffered by minorities are, by definition, on account of something besides race. Moreover, where, as here, minority candidates receive the same level of support as similarly situated nonminority candidates, a finding that the electorate is race-blind is based purely on objective "voter behavior," rather than any effort to determine the subjective *motivation* of those voters. *Gingles*, 478 U.S. at 62 (plurality).

[18] The legislative history confirms that Section 2 does not forbid electoral mechanisms where minority losses occur because of colorblind voting where candidates are judged without regard to race. Thus, the Senate Report, which is the most significant source of legislative history for the 1982 amendments, places "repeated emphasis on 'intensive racial politics,' on 'racial political considerations,' and on whether 'racial

III. The Second Circuit's Interpretation Of Section 2 Renders That Statute Unconstitutional.

This Court has consistently held that creating a majority-minority district for racial reasons, like all other state actions favoring minorities for racial reasons, is only justified to correct public or private voting discrimination *against* minorities. *See, e.g., Shaw*, 509 U.S. at 656; *Johnson*, 512 U.S. at 1020 ("[M]ajority-minority districts [are] *remedial* devices.") (emphasis added); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989) (Race-conscious measures are "strictly reserved for remedial settings."). Race-conscious action designed to achieve "more" or proportional representation for minorities is facially illegitimate " 'discrimination for its own sake.' " *Croson*, 488 U.S. at 496 (quoting *University of California Regents v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J., concurring)).[19] Here, far from there being "strong" evidence that white voters racially discriminated, the objective evidence establishing equal levels of support for candidates of both races demonstrates that Hempstead is a jurisdiction where "race no longer matters" to nonminority voters. *Shaw*, 509 U.S. at 656, 657. Notwithstanding the absence of any remedial predicate, the court below nonetheless required Hempstead to create a black-majority district drawn for racial purposes to replace the race neutral at-large system. It did so,

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politics . . . dominate the electoral process.' " 478 U.S. at 101 (O'Connor, J., concurring) (citations omitted). To that end, the Report makes it abundantly clear that "the very terms and operations of the provision . . . confine its application to actual discrimination." S. Rep. at 43. Thus, a proper application of the "results" test required courts to "distinguish[ ] between situations in which racial politics play an excessive role in the electoral process, and communities in which they do not." S. Rep. at 33. In doing so, a finding of "racial bloc voting" is established only when "race is the predominant determinant of political preference." S. Rep. at 33.

[19] *See also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *Shaw*, 509 U.S. at 656; *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting).

moreover, for the avowed purpose of providing "black communities" with a "black member who is *accountable to them*" – a "benefit" not available to any other group in Hempstead's at-large system. App. 106 (emphasis added). Thus, a federal court required a local jurisdiction to create a single-member district "solely to effectuate the perceived common interests of one racial group" because it believed that their elected official's "primary obligation is to represent only the members of that group, rather than [the Town] as a whole," even though there were no "patterns of racial bloc voting . . . to counteract" through this "racial gerrymander." *Shaw*, 509 U.S. at 648. *See also id.* (quoting *Wright v. Rockefeller*, 376 U.S. 52, 66-67 (1964) (Douglas, J., dissenting)). Since a "racial gerrymander, *even for remedial purposes*, may balkanize us into competing racial factions" – contrary to the "goal that the Fourteenth and Fifteenth Amendments embody" – *gratuitously* injecting such racial line-drawing and racial politics into an electorate where "race no longer matters" is plainly contrary to these core constitutional requirements. *Shaw*, 509 U.S. at 657. If Section 2 requires jurisdictions, against their will, to use such divisive racial classifications absent any racially discriminatory voting predicate, it both violates those Amendments and also exceeds Congress' enforcement powers under those Amendments to enact laws which act as a "hedg[e] against *racial* discrimination." *Gingles*, 478 U.S. at 83 (White, J., concurring) (emphasis added).[20] At a minimum, Section 2 should not be construed in a manner that raises such serious constitutional concerns. *Edward J. De Bartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).[21]

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[20] *See City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (Only "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power . . . [*i.e.*, the Voting Rights Act was] a measure to combat racial discrimination in voting."); *Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10 (1966); *Miller v. Johnson*, 515 U.S. 900, 927 (1995).

[21] The Second Circuit's interpretation of Section 2 is also constitutionally suspect because it erects a dual regime where identically

IV. The Remedy Imposed By The Court Below Exceeds The Scope Of Federal Judicial Authority.

The court found that the at-large system diluted black votes as compared to a single-member black majority district, because the latter enabled blacks to elect their preferred Democratic candidates. Thus, altering the at-large plan to create this black majority district fully cured the alleged discriminatory result of the multi-member plan by providing black voters with a district where they could elect their preferred candidate. Under well-established remedial principles, the court was therefore without power to further disturb the at-large plan because the remaining portion of that system could not possibly affect the level of black representation or blacks' ability to elect their preferred candidates.[22]

Rather, the court's remedial power to alter the law requiring the at-large system was strictly "limited to those [changes] necessary to cure any constitutional or statutory

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situated jurisdictions face differential liability solely on the basis of their political affiliation. If the Republicans constitute a majority in a jurisdiction, and minorities prefer Democrats (as is typically the case), a white majority district or at-large system violates Section 2 because minority-preferred candidates cannot be elected. But an identical town with a Democratic majority will face no such potential Section 2 exposure. If Hempstead were predominantly Democratic (or were to become so in the near future), its at-large system would plainly satisfy Section 2 because minorities would be able to elect their preferred candidates. Indeed, the lower court's remedy illustrates the extent to which it converted Section 2 into a vehicle for partisan favoritism. The remedy will not increase *black* representation on the Board (where one of the six members is a black Republican), but will increase *Democratic* representation by ensuring that one of the six members will be a Democrat.

[22] Blacks constitute approximately 3% of the population in the portion of the Town not in the black majority district and thus will either be an infinitesimal percentage of five single-member districts or an infinitesimal percentage of one district which elects five Board members at-large. App. 41-42.

defect." *Upham v. Seamon*, 456 U.S. 37, 43 (1982).[23] Accordingly, if a jurisdiction-wide redistricting scheme contains one discriminatorily drawn district, federal courts may not alter any more of that redistricting plan than is necessary to replace the discriminatory district with a nondiscriminatory district. *Upham*, 456 U.S. at 42-43; *White*, 412 U.S. at 796. For the same reason, the court below could not alter any more of the Town's at-large policy than was necessary to create a black majority district and thus eliminate any "dilutive" effect. *Whitcomb* makes this plain. There, even if the multi-member district had been unconstitutional, the "district court erred" by "brushing aside state apportionment policy" instead of adopting the remedial "alternative of creating single-member districts in the ghetto and leaving the [multi-member] district otherwise intact." 403 U.S. at 160. The court below similarly erred by not leaving the nondiscriminatory, remaining portion of the multi-member district plan intact.

The lower court sought to evade these bedrock limitations on federal courts' remedial powers by "finding" that preservation of the at-large scheme outside of the judicially-imposed black majority district reflected a discriminatory purpose by the current Board when it proposed its remedial plan. This is both the wrong question and the wrong answer. The question is whether the court could strike down the at-large law at issue in its *entirety*, or only that part which conflicted with federal law. Since the court found that the at-large system was not adopted with a discriminatory purpose,[24] and could be implemented outside the black majority district

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[23] *See also White v. Weiser*, 412 U.S. 783, 794 (1973); *Milliken v. Bradley*, 433 U.S. 267, 282 (1977) ("[F]ederal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation. . . . "); *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993) ("[T]he federal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements.").

[24] *See supra* p. 4. The at-large voting system is used "in every town in Long Island and all but approximately ten of the 900 towns in New York State." App. 65.

without a discriminatory result, continued use of the system outside the black majority district did not "contravene any federal requirement" and thus could not be struck down by the Court. Moreover, the fact that the current Board sought to preserve an at-large system adopted for *nondiscriminatory* reasons to the maximum extent consistent with federal law cannot possibly reflect any *discriminatory* purpose. It is for the Town, not the federal judiciary, to decide whether the citizens of Hempstead will continue to enjoy the benefits of the at-large system to the maximum extent possible.[25]

Since this remedy exceeds fundamental limitations on federal courts' remedial powers and is necessary to fully evaluate the extent to which the decision below converted Section 2's guarantee of equal racial opportunity into a guarantee of partisan and racial proportionality, certiorari should also be granted on this question.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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[25] In an extraordinary display of judicial schizophrenia, the courts below complain that this would "segregate" the Town into white and black "apartheid" boroughs in a manner condemned by *Shaw* and give the residents of the black majority district a different kind of representation than that enjoyed by the residents of the rest of the Town. App. 41-42; App. 151-152. This "segregation," however, was foisted upon the Town by respondents and the court when they required a black-majority district – identical to that proposed by petitioners – containing 97% of the Town's black population. App. 141-147; App. 16, 21. The black majority district is no more segregated or racially discriminatory because it is adjacent to a multi-member district, rather than single-member districts. Moreover, the fact that the district court required the Town to create a district where a "Town Board member is accountable to [black communities] in the Town," rather than to all of the Town's citizens, hardly mandates that the Board impose such parochial representation on the rest of the Town's citizens, in contravention of New York's long-standing devotion to multi-member representation.

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DOROTHY GOOSBY and SAMUEL PRIOLEAU, Plaintiffs-Appellees, XAVIER MORALES and MILADYS MORALES, Plaintiffs, -v.- TOWN BOARD OF THE TOWN OF HEMPSTEAD, NEW YORK, GREGORY P. PETERSON, RICHARD V. GUARDINO, PATRICK A. ZAGARINO, CURTIS FISHER, JOSEPH RA, ANTHONY SANTINO and JOSEPH KEARNEY, in their official capacities as members of the Town Board of the Town of Hempstead, Defendants-Appellants, NASSAU COUNTY BOARD OF ELECTIONS, JOHN DEGRACE, STEVEN SABBATH, in their official capacities as Commissioners of Elections of Nassau County, Defendants.

Docket No. 97-7403

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

180 F.3d 476; 1999 U.S. App. LEXIS 14165

June 25, 1999, Decided

COUNSEL: RANDOLPH M. SCOTT-McLAUGHLIN, White Plains, N.Y. (Frederick K. Brewington, Hempstead, NY, Richard Charles Hamburger and David N. Yaffe, Melville, NY, of counsel), for Plaintiffs-Appellees.

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(Elaine R. Jones, Norman J. Chachkin, Jaqueline A. Berrien, Victor A. Bolden, Victor Paladino, NAACP Legal Defense and Educational Fund, Inc., New York, NY, Todd A. Cox, NAACP Legal Defense and Educational Fund,

Inc., Washington, DC, of counsel) for the NAACP Legal Defense and Educational Fund, Inc., as amicus curiae.

(Willie Abrams, Dennis Courtland Hayes, National Association for the Advancement of Colored People, Baltimore, MD, of counsel) for the National Association for the Advancement of Colored People, as amicus curiae.

JUDGES: Before: MINER, McLAUGHLIN, and LEVAL, Circuit Judges.

OPINION BY: MINER

OPINION:

MINER, Circuit Judge:

Defendants-appellants the Town Board of the Town of Hempstead, New York (the "Board" or "Town Board"), and Gregory P. Peterson, Richard V. Guardino, Patrick A. Zagarino, Curtis Fisher, Joseph Ra, Anthony Santino and Joseph Kearney, in their official capacities as members of the Town Board,[1] appeal from a final judgment entered in the United States District Court for the Eastern District of New York (Gleeson, J.), following a bench trial, enjoining the Town of Hempstead from the use of an at-large voting method to elect members of the Town Board. The court determined that the at-large method violated section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, and ordered the Town Board to submit a remedial plan that would divide the Town of Hempstead (the

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[1] The individual defendants-appellants as well as the Town Board are referred to collectively throughout this opinion as the "Town Board" or the "Board".

"Town") into six single-member districts. The Town Board thereafter submitted two proposed plans, the first consisting of one single-member district and one multi-member district, which the district court determined violated the Equal Protection Clause of the Fourteenth Amendment. The district court found that the alternative proposal of six single-member districts was consistent with the Equal Protection Clause and ordered that it be adopted by the Town Board.

For the reasons that follow, we affirm.

INTRODUCTION

In August of 1988, plaintiffs Dorothy Goosby and Samuel Prioleau brought a class action alleging that the at-large voting method adopted for the election of members to the Town Board violated their rights under the First, Thirteenth, Fourteenth and Fifteenth Amendments of the United States Constitution and section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973. The district court certified a class that included "[a]ll present and/or potentially eligible Black voters residing in the Town of Hempstead."[2] The plaintiffs alleged that the at-large method diluted and submerged their voting

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[2] The district court also certified a subclass of "all present and/or potentially eligible Puerto Rican voters and other voters of Hispanic descent residing in the Town of Hempstead." The representatives of this class voluntary withdrew as plaintiffs-representatives after all parties agreed that the Hispanic population was not statistically significant. *See Goosby v. Town Bd. of the Town of Hempstead*, 956 F.Supp. 326, 328 n.1 (E.D.N.Y. 1997).

strength into the white majority, thereby effectively ensuring that they would not be fairly represented on the Town Board.

Following discovery, the Town Board moved for summary judgment, arguing that plaintiffs could not demonstrate legally significant white majority bloc voting, an essential precondition for a successful section 2 claim under *Thornburg v. Gingles*, 478 U.S. 30, 50-51, 92 L. Ed. 2d 25, 106 S. Ct. 2752 (1986). The Town Board argued that, because Republican Party affiliation was the determinant of electoral success in Town-wide elections, the "bloc voting" that plaintiffs had demonstrated was along partisan, not racial, lines. The majority bloc that consistently defeated the typically Democratic candidates of choice of the black population was therefore not a "white" majority bloc but simply a Republican one. The district court denied the motion for summary judgment after concluding that the resolution of this issue depended on material issues of fact to be determined at trial.

In July and August of 1996, the district court conducted a bench trial at which it heard testimony from fact and expert witnesses produced by each side and received in evidence documents produced by each side. In February of 1997, the district court entered comprehensive Findings of Fact and Conclusions of Law in an opinion that first analyzed whether the at-large election method for Town Board members violated section 2 of the Voting Rights Act under the framework of *Gingles*, 478 U.S. at 50-51.

The district court found that the plaintiffs had satisfied the first two *Gingles* preconditions, that "the minority

group [is] sufficiently large and geographically compact to constitute a majority in a hypothetical single-member district," and that "black voters in the Town are politically cohesive." *Goosby v. Town Bd. of the Town of Hempstead*, 956 F. Supp. 326, 348, 350 (E.D.N.Y. 1997) ("*Goosby I*") (citing *Gingles*, 478 U.S. at 50).

In addressing the third *Gingles* precondition, the district court determined that there was "legally significant white bloc voting" such that "the white majority votes sufficiently as a bloc to enable it usually to defeat the minority-preferred candidate." 956 F. Supp. at 350 (citing *Gingles*, 478 U.S. at 50-51). Relying on our holding in *NAACP, Inc. v. City of Niagara Falls, NY*, 65 F.3d 1002, 1019 (2d Cir. 1995), the district court noted that there had been, in almost every election, a "most preferred candidate" among black voters. *See Goosby I*, 956 F. Supp. at 351. This most preferred candidate always lost as a result of white voters voting for another candidate. *See id.* Having found, through a review of statistical evidence, that there was a "persistent pattern of racially polarized voting," the district court concluded that "this was sufficient to satisfy the third *Gingles* precondition." *Id.* In so doing, the district court implicitly rejected the Town Board's contention that the strong correlation between race- and partisan-based voting precluded it from finding "legally significant white bloc voting" unless it first found that partisan politics was a proxy for racial animus in the Town. The district court instead addressed the evidence of partisanship under the "totality of the circumstances" analysis. *See id.* at 353-55.

The district court then noted that the satisfaction of the *Gingles* preconditions was not in itself sufficient to

establish a violation of section 2 of the Voting Rights Act. *See id.* at 351. Accordingly, it proceeded to evaluate whether, under the "totality of the circumstances," the at-large method of electing Town Board members "impaired the ability of black voters to participate equally in the political process and elect candidates of their choice." *Id.* at 351. As a guide to this inquiry, the district court used the factors outlined in the Senate Judiciary Committee Report accompanying the passage of the 1982 Amendment to section 2 of the Voting Rights Act (the "Senate Report").

The district court proceeded to address and make factual findings regarding the history of discrimination in the Town and other factors concerning the voting power of black voters in the Town. It reviewed the record to make findings addressing electoral mechanisms that enhance vote dilution, the dearth of black candidates elected to the Town Board, the Board's lack of responsiveness to the concerns of the black communities, the inaccessibility to blacks of the Republican Party slating process, evidence of subtle racial appeals in campaigns for Town Board and the justifications offered for retaining the at-large system. *See id.* at 337-48.

The district court then addressed and rejected the Town Board's contentions that "partisan affiliation, not race, best explains the divergent voting patterns among black and white voters in the Town." *Id.* at 353. It rejected the Town Board's argument that the correlation between race and partisanship created a presumption that partisanship was the controlling factor and the further argument that plaintiffs must establish that racial bias infected the voting community to rebut this presumption.

See id. Instead, the district court found that the correlation between race and partisanship was not dispositive but "simply among the many factors to be considered" under the totality of the circumstances analysis. *Id.* In light of all the surrounding circumstances, the district court found that the divergent voting patterns were better explained by race than by partisanship. *See id.* at 355.

The district court concluded that the at-large system employed for Town Board elections "operated to invidiously exclude blacks from political life in violation of Section 2 [of the Voting Rights Act of 1965]." *Id.* at 356. The court then ordered the Town to submit "a remedial plan that divides the Town into six single-member districts." *Id.*

In May of 1997, the Town Board submitted two redistricting proposals. The Town Board's favored plan was a two-district system, with one single-member district encompassing the majority of the Town's black population and approximately one-sixth of the Town's total population, and a second five-member district including the remaining five-sixths of the Town's population. The Town Board's alternative plan consisted of six single-member districts, one of which was the same majority black district advanced under the first plan.

The district court determined that the two-district plan violated the Equal Protection Clause of the Fourteenth Amendment because it was a race-based plan that was not narrowly tailored to remedy the section 2 violation. *See Goosby v. Town Bd. of the Town of Hempstead*, 981 F. Supp. 751, 761 (E.D.N.Y. 1997) ("*Goosby II*"). The court

found that the six-district plan, however, was not predominantly motivated by race and that even if it were, it was narrowly tailored to remedy the section 2 violation. *See id.* at 761-62. The district court ordered that the six-district plan be implemented by the Town Board but stayed the implementation pending appeal.[3] *See id.* at 763.

The Town Board now appeals, arguing that the district court erred in finding legally significant white bloc voting as opposed to merely Republican Party bloc voting and in its determination that the proposed two-district plan was unconstitutional.

BACKGROUND

The Town of Hempstead, founded in 1643, is located in Nassau County and consists of twenty-two villages and thirty-four unincorporated areas. According to the 1990 census, the Town had a population of 725,639, making it the most populous town in the United States and more populous than six states and all but thirteen cities.[4]

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[3] The court also denied the plaintiffs' motion to enjoin the Town Board election to be held on November 7, 1997 under the at-large system, noting that allowing the election would cause no irreparable injury to the plaintiffs because the Town could convene a special election if this Court affirmed the district court's ruling. *See Goosby II*, 981 F. Supp. at 763.

[4] According to the 1990 census, Alaska, Delaware, North Dakota, South Dakota, Vermont and Wyoming had smaller populations than the Town. *See* Information Please Almanac 749-82 (Otto Johnson ed .1997). The cities of New York, Los Angeles, Chicago, Houston, Philadelphia, San Diego, Phoenix, Dallas, San Antonio, Detroit, San Jose, Indianapolis and Baltimore were the only United States cities with larger populations than the Town. *See id.* at 812.

Thus, the U.S. Senators from the smaller states, as well as many members of Congress, represent fewer constituents than each of the members of the Town Board. The Town is the westernmost in Nassau County, Long Island and shares a border with the borough of Queens in New York City.

The Town has traditionally been a Republican stronghold; since the inception of Town government in 1907, a member of the Republican Party has won every Town-wide election, including the positions of Presiding Supervisor, Supervisor and Town Board member. Of registered voters in 1993, 48.6% were registered as Republicans, 29.6% were registered as Democrats, and 21.8% were either registered in other parties or expressed no party affiliation.

Historically, the Town's citizenry has also been predominantly white. The Town's black population has grown continuously since 1960, when the black population was 3.4% of the total population of 740,738. In 1970, those numbers rose to 5.8% and 801,000 respectively. In 1980, the black population grew to 9.3% of the total population of 738,517 and 7.9% of the Town's total voting age population. In 1990, the black population constituted 12.1% of the Town's 725,639 residents and 11.2% of the Town's voting population while white voters constituted 84.8%. The black population of the Town is concentrated in one area composed primarily of six communities: Roosevelt, Freeport, Hempstead, Lakeview, Uniondale and Baldwin.

Whites in the Town have a higher median household income than blacks. There are higher rates of poverty and

unemployment among blacks, and a higher percentage of whites are employed in white-collar jobs. Whites are also more likely to have achieved a higher level of education and more likely to own a home, a car and a telephone. On average, the homes owned by blacks are less valuable than the homes owned by whites. Despite the foregoing, blacks in the Town are relatively affluent. Blacks in the Town have a higher median household income than either whites or blacks in the United States or in New York State. Moreover, blacks in the Town surpass national averages for blacks nationwide in home ownership and home value.

There is a correlation between race and political party affiliation in the Town. Among white registered voters, 51% registered as Republicans, 26% as Democrats and 23% in another party or in no party. Among black registered voters, however, only 22% registered as Republicans, while 68% registered as Democrats and 10% in another party or expressed no party affiliation. At the time of trial, registered black voters accounted for 4% of registered Republican voters and 18% of Democratic voters.

The Town's legislative body, the Town Board, currently consists solely of Republican members who were elected under an at-large voting system. As noted, no Democrat has ever been elected to the Board. Before the election of one black member in 1993, the Town Board had also always been composed only of white members.

The method of electing members to the Town Board, and the results that it has produced, is at the heart of this

law suit. The Town Board has six members,[5] each of whom is elected at-large to serve a four-year term. These elections are staggered so that three members, or half the Board, are elected every two years. Under the current at-large system, each voter may cast up to a total of three votes, one for each vacant seat on the Board, but may cast only one or two votes if the voter desires to do so. This practice is referred to as "single-shot" voting. Casting multiple votes for one candidate, or cumulative voting, is prohibited. The three candidates who receive the highest vote total take office as Town Board members; a candidate need not receive a majority of votes to assume a seat on the Board.

The Town Board is the principal arm of the Town government. It is the Board's function, as the representative body of the Town government, to identify and resolve matters of importance to Town residents. The Board's formal legislative powers and responsibilities include naming Town government officials and filling vacant Town government positions, adopting a Town budget and administering Town finances, establishing residential and commercial zoning, acquiring, selling and maintaining Town property, maintaining and repairing Town streets, parks and facilities, removing fire and

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[5] The number of Town Board members was increased from four to six by referendum in 1967. The Town Supervisor has an ex officio seat on the Town Board and is the Town's chief operating officer and administrator. Like the Board members, the Town Supervisor is elected at-large and serves a two-year term. The plaintiff class did not challenge the at-large method of electing a Town Supervisor.

health hazards and awarding and executing Town contracts. The Town employs roughly 2,400 people and had an annual budget of $290 million in 1996.

The Republican Party has a pervasive presence in both the social and the political life of residents of the Town. Membership in the party is essential for election and appointment to Town office and generally for employment in Town government positions. Within the Town, neighborhoods and communities form Republican social clubs, which are intended to enhance camaraderie and activism. The official governing bodies of the Republican Party organization are the Town and County Republican committees. Two committee members are selected by the Republican electorate in each election district. For the purpose of electing executive leaders, various election districts are grouped together to form an "executive area," which is an informal geographical designation. For example, the executive area of East Meadow contains 26 election districts, and therefore the Republican committee in East Meadow has 52 positions for committee members. These executive leaders meet with the vice-chairs[6] of the Nassau County Republican Party and the Nassau County

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[6] Executive leaders nominate candidates for county chairman, and the committee members then elect a chairman. At the time of trial, there were at least 20 vice-chairmen of the Nassau County Republican Party. The first vice-chairman assumes the duties of the chairman on an interim basis if the chairman is unable to fulfill his duties. The chairman appoints the other vice-chairmen, who typically are people who have been active politically but have not been elected as executive leaders.

Republican Party chairman ("county chairman") in executive committee meetings to discuss Republican Party business.

Republican candidates for elected office within the County are nominated through a slating process. First, the 69 executive leaders, three of whom are black, caucus among themselves and with the county party vice-chairmen to discuss potential candidates. The executive leaders then forward the resumes of potential candidates to the county chairman. Religious organizations, service organizations, business groups and civic associations often recommend candidates to executive leaders and the county chairman. The Nassau County African American Republican Coalition ("NCAARC") is one such association that has been active in recommending candidates. The county chairman selects a potential candidate for each office from those recommended to him and then recommends the candidate to the other members of the executive committee for nomination. After receiving the chairman's selection, the executive committee forwards its recommendation to the entire committee for a final vote at the party convention. The convention consists of the approximately 2,000 committee members from the various local committees within Nassau County. The vote of each delegate at the convention is weighted according to the Republican voter turnout in the previous election in the committee member's election district. This slating process is the same for Town-wide elections, except that participation is limited to executive leaders, vice-chairs, and delegates who represent a constituency in the Town.

Neither the executive committee nor the Republican convention has ever rejected the county chairman's recommendation. Further, the Republican Party has never held a primary election to determine a nominee for Town Board. Though it has nominated blacks for some elective offices, as detailed below, only once has the Republican Party nominated a black for Town Board member. In 1989, a group of black Republicans in the Town, including members of the NCAARC and several ministers, marched on Town Hall to protest the Town Board's failure to appoint a black Republican to the Board to fill either of the two Board vacancies in that year or the two vacancies in 1987.

In 1993, another vacancy arose on the Board. The NCAARC recommended that attorney Lance Clark, an active black Republican committeeman and Deputy Mayor and Trustee of the Village of Hempstead, be appointed to fill this vacancy. Members of the NCAARC preferred Clark to another possible African-American candidate for Town Board, Curtis Fisher, because Clark had "paid his dues" and would represent the interests of the Town's black community vigorously. Clark was not, however, interviewed for the appointment. Instead, County Chairman Mondello recommended that Fisher be appointed to fill the vacancy and the Board accepted the recommendation. Fisher thereafter was unanimously recommended by the executive committee and the Republican committee for nomination as the Republican candidate for Town Board. He was subsequently elected as an incumbent to retain the seat to which he had been appointed. He received the most votes that any candidate

had received in over a decade, with 49.2% of the white vote and 29.5% of the black vote.

Curtis Fisher is the only black person ever to sit on the Town Board. Fisher was raised in the Lakeview area but currently resides in the predominantly white community of Baldwin Harbor. Before his appointment to the Town Board, Fisher was an executive assistant to the Town Board in 1988, and served as Affirmative Action Officer for the Town beginning in 1989. He is a close friend and tennis partner of County Chairman Mondello.

Several black Republicans have won election to judicial office in districts that include the Town. Between 1989 and 1992, two black Republicans were elected to judicial office in District Two of the Nassau County District Court. District Two consists of the Town and the City of Long Beach, which had a population of 33,510 in 1990. Candidates for these judicial offices are nominated through the same slating process as candidates for the Town Board. At least one of the judges elected was not the preferred candidate of black voters in the Town. Between 1989 and 1992, two black justices were also elected to the Tenth Judicial District of the New York State Supreme Court, which includes all of Nassau and Suffolk Counties. According to the 1990 Census, these two counties had a combined population of 2,609,212, meaning that the Town's population was less than 30% of the entire population from which these justices were elected. The slating process for candidates for justice of the New York State Supreme Court involves nomination at a convention of delegates selected from the entire judicial district. *See* N.Y. Election Law § 6-106 (McKinney 1998).

Although other blacks have been elected to office within segments of the Town, the segments from which they were elected are predominantly black. The 18th Assembly District, which includes 81% of the black population of the Town, has elected black Democrats to the State Assembly in each election between 1986 and 1992. James Garner was elected as Mayor of the Village of Hempstead, Lance Clark as Trustee and Deputy Mayor of the Village of Hempstead, and Darlene Harris as a Republican representative from Roosevelt to the Nassau County legislature.[7]

The Town Board has been criticized for being unresponsive to the needs of the black community. A few incidents involved the Town Board's failure to address racial intolerance in Town workplaces. The Town does not have an affirmative action policy, but only a vague standard prohibiting Town employees from using racial slurs. Complaints of discrimination have been handled

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[7] Over the years, the Town Board has also appointed a number of black Republicans to various Town government posts. For example, William Phears was named as Commissioner of the Department of Water, Robert Francis as Commissioner of the Department of Economic Development, Sinita Walker as a member of the Board of Zoning Appeals and subsequently as Commissioner of the Department of Elections. Additionally, Clinton Boone was named as Commissioner of the Department of Occupational Resources, Peter LeMonier as Deputy Commissioner of the Department of Parks and Recreation, Jay Jackson as General Counsel to the Department of Planning and Economic Development, Henry Holly as a member of the industrial development agency and planning board, and Briding Newell as head of the Town agency that addresses drug and alcohol issues.

informally rather than through an administrative process or the courts.

For example, during Curtis Fisher's tenure as Affirmative Action Officer, a black labor foreman at the Department of Sanitation complained that he was given unfavorable labor assignments and insulted by racial epithets. Fisher made casual inquiries but did not file a report or recommendation with the Town Board, nor did he initiate any disciplinary process or training to combat bigotry in the workplace. At trial, he admitted that he did not know whether the employees who had antagonized the labor foreman had been disciplined.

In a second incident, a Jamaican immigrant who worked as a part-time carpenter for the Town was passed over for full-time employment in favor of two less senior white carpenters. The carpenter complained to Fisher, by this time a member of the Town Board. Fisher spoke with the Town's Personnel Director and then reported back to the carpenter that there was nothing he could do. The carpenter subsequently prevailed on a discrimination claim against the Town. In a third incident, the Town Board was informed that a trophy on display at the Freeport Volunteer Fire Department bore a Ku Klux Klan inscription yet failed to do anything about it.

Black residents have also complained that the Town Board has neglected projects that affect the black community. For example, residents in Lakeview have repeatedly sought funding for a community center, but have been unsuccessful. Councilman Fisher, as de facto representative of this community, *see infra*, did not attempt to obtain

funding for this project. To justify his inaction, Councilman Fisher explained that funding such a project would require funding several similar projects in other communities. All but one of these funding requests, however, were from other predominantly black communities. Councilman Fisher did not attempt to obtain funding for any of these other community projects either. Additionally, Fisher has not forwarded a recommendation for a sorely-needed redevelopment of the Roosevelt Town Center to the Town Board, although this has been an issue in that community since at least 1992.

The Town has not been entirely unresponsive to the concerns of its black residents, however. There have been a number of development and construction projects in predominantly black neighborhoods. The record reflects that Robert Francis, a black Republican serving as Commissioner of Economic Development, has consistently worked to respond to the concerns of black communities within the Town.

Moreover, there is no history of official discrimination against blacks in the Town. Neither the adoption nor the retention of the at-large system seems to have been motivated by racial animus. Historically, however, there have been two provisions of law that have had a discriminatory effect on blacks.

From 1922-1969, Nassau County required each citizen to present a certificate of literacy in order to vote. It appears that the literacy test had a disproportionate impact on blacks' ability to vote. Also, more blacks than whites were disenfranchised by a New York Election Law provision that purged voters from the election rolls if

they failed to vote for four successive years. N.Y. Election Law section 5-406 (McKinney 1998), repealed in 1995, purged 56% more voters in predominantly minority election districts than in predominantly white election districts. A registered black voter in the 18th Assembly District, a majority-minority district from which a member of the New York State Assembly is elected, was 70% more likely to be purged from the voting rolls than a registrant from any other assembly district in the Town.

Subtle racial appeals have been made, from time to time, in Republican campaigns for elected office within the Town. These racial appeals might be attributable to the heightened racial tension that has resulted from blacks resettling from predominantly black neighborhoods in the adjacent borough of Queens in New York City to predominantly white neighborhoods in the Town.

The first instance noted in the record of racial appeals in Town elections occurred in a late 1970s campaign for a State Senate seat. The Republican candidate in that election distributed brochures containing pictures of black children in school buses to indicate that support of his Democratic opponent would result in a busing program.

A later appeal of the same nature occurred in 1987 in the campaign of incumbent Town Board member Joseph Cairo. Cairo, reacting to an influx of blacks into the communities of Elmont and North Valley Stream, distributed campaign literature proclaiming that he was "a major opponent of those who would seek to 'Queensify'

North Valley Stream and its environs." There was evidence that Cairo's claim to have "sensitized local patrolmen to the special concerns of the community" meant that police were to act as an unofficial border patrol, confronting black youths from Queens who ventured into the Town. Though the claims in the brochure may be subject to different interpretations, there was testimony that the campaign literature was perceived at least by some in the electorate to be a racial appeal.

There is evidence that the sheer geographical size of the Town is a barrier to black voting strength. According to testimony at trial, campaigning is made more difficult because of the resources required to visit, distribute literature to, and address issues in all parts of the Town. When contrasted with blacks' abilities to elect their preferred candidates in smaller districts like the 18th Assembly District and Nassau County legislative districts, the size of the Town is a factor in reducing the chance that a minority candidate will be elected to the Board.

At trial, the plaintiffs' expert in districting, Dr. Andrew Beveridge, testified that the Town can be divided into six single-member districts, one of which would be a majority-minority district. Dr. Beveridge followed four principles in establishing these districts: (1) substantial equality of population; (2) conformity of the districts' boundaries, to the extent possible, to existing political geography; (3) reasonable compactness; and (4) after satisfying the first three criteria, grouping the black population in one district to the extent possible. The six districts proposed by Dr. Beveridge each include roughly the same number of constituents, 120,000. The largest district is

1.67% larger than 120,000, and the smallest district is only 2.53% smaller than 120,000.

Proposed District 3, the majority-minority district with blacks constituting 52.47% of the voting age population, follows existing political boundaries with minor exceptions. It departs from the boundaries of villages and Census Designated Places only in two places. Proposed District 3 includes Lakeview, Roosevelt, Freeport and Hempstead, the four predominantly black communities in the Town. Its boundaries roughly trace the boundaries of the 18th Assembly District. Using a standard measure of compactness, District 3 is somewhat less compact than the average of the other five districts in the proposed plan. It is nonetheless more compact than the average United States Congressional district, both nationwide and in New York State. It is also more compact than the 18th Assembly District.

There is no dispute among the parties that blacks within the Town are cohesive in their support for Democratic candidates for Town Board. Further, based on a statistical "performance analysis," another expert for the plaintiffs, Dr. Michael D. MacDonald, concluded that it was reasonable to believe that a candidate preferred by black voters would win in the proposed majority-minority district.

Dr. MacDonald testified that there has been white bloc voting in the Town. Dr. MacDonald examined the results in elections for Town Board seats and compared candidates' Town-wide support with support for candidates in the majority-minority 18th Assembly District.

From this comparison, he drew the preliminary conclusion that black-preferred candidates would have fared better if they could have run in a majority black district. However, because this analysis was insufficiently precise to measure the differences in support between black and white voters, Dr. MacDonald proceeded to a second step in his analysis. Using "ecological correlation and regression analysis" and "extreme case analysis," Dr. MacDonald measured the strength of the relationship between the race of a voter and support for a particular candidate. Because each of these methods provides only an estimate, he applied each method to voters of various areas to attempt to achieve consistent results. Analyzing the results in Town Board elections from 1983 to 1993, Dr. MacDonald assembled a set of data. From these data, Dr. MacDonald concluded that there had been a pattern of racially polarized voting in each of the Town Board elections. The defendant's expert, Dr. Harold W. Stanley, reached a similar conclusion using a slightly more detailed analysis. In Town Board elections from 1983 to 1993, the winning candidates received between 15% and 29% of the black vote and between 49% and 62% of the white vote. The difference between white and black support for a given candidate was less than 20 percentage points on only one occasion and usually exceeded 30 percentage points.[8] The data reveals that the white Republican majority consistently defeats the Democratic candidates, who are supported by the black minority.

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[8] As noted, in the 1993 election of Curtis Fisher, the difference between his support among white voters and his support among black voters was 19.7% – i.e., he received 49.2% of the white vote and 29.5% of the black vote.

Ultimately, both sides agree that there is polarized voting but dispute its cause.

At trial, the Town Board offered several justifications for the continued use of the at-large system. The Town Supervisor testified that the at-large method brought about "less government[,] not more government," and that the at-large system ensured an "open" atmosphere in which each Town Board member was responsible for the welfare of every citizen in the Town. Further, he testified that a district-based system might encourage a more parochial mentality in which Board members would combine their votes, for example, to place undesirable facilities in a district represented by a Democrat.

The Town Supervisor also testified that, due to the size of the Town Board's constituency, the Town has been divided into de facto districts that are made up of the areas where the Board members reside or areas for which they are otherwise assigned responsibility. Under this de facto district system the Town Supervisor assigns geographic areas to each Board member, and it is generally understood that the assigned Board member will be responsible for addressing the concerns of constituents within his assigned region. Because no Board member has ever resided within the areas of the Town that are predominantly black, the Town Supervisor has assigned a Board member from outside the community to address the needs of the black communities. Since 1993, Curtis Fisher has been the member assigned to address the needs of the predominantly black areas of the Town.

Dr. Stanley, the Town Board's expert, introduced the results of a regression analysis designed to examine the

relationship between partisanship and race. He concluded, first, that higher percentages of blacks support Democratic candidates and higher percentages of whites support Republican candidates. He then assessed the results of two regression analyses, one comparing partisan composition of an election district with support for a candidate, the second comparing racial composition of an election district with support for a candidate. He found that changes in the partisan composition of a district created a greater variance in support for a candidate than changes in the racial composition of a district. Thus, Dr. Stanley concluded that the partisan composition of a district was a stronger determinant of candidate success than the racial composition of a district.

Additionally, Dr. Stanley found that candidates received similar levels of support from the electorate regardless of the race of the candidate. In other words, when Curtis Fisher ran for Town Board, the level of support he received from white voters was similar to that received by white Republican candidates for Town Board. Dr. Stanley ultimately concluded that, though there was a pattern of racially polarized voting in the Town, there was a stronger pattern of voting along partisan lines.

DISCUSSION

At the outset, we set forth the statutory provisions that govern the Voting Rights Act violation claim put forward by the plaintiff class:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or

political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (1994).

In accordance with the foregoing, then, a violation of the Voting Rights Act must be based on proof of the following elements in combination: (1) a voting standard, practice, procedure, qualification or prerequisite (2) imposed by a State or political subdivision (3) in a manner that denies or abridges the right of any citizen to vote (4) on account of race, color or membership in a language

minority group.[9] Moreover, the totality of the circumstances must demonstrate that (1) the political processes for nomination and election (2) are not equally open to participation by members of the protected class (3) because the class members have less opportunity than others to participate and elect their representatives of choice. One circumstance to be considered in the totality is the extent to which class members have been elected, but there is no right to proportional representation.

The Supreme Court established the basic framework for analysis of claims of unlawful dilution of minority voting strength under the Voting Rights Act in *Thornburg v. Gingles*, 478 U.S. 30, 92 L. Ed. 2d 25, 106 S. Ct. 2752 (1986). In *Gingles*, black citizens of the State of North Carolina claimed that a redistricting plan for the state legislature involving multi-member districts violated the Act by diluting black voting strength. The Court instructed that the following three circumstances are "necessary preconditions" to a finding of vote dilution:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . .

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[9] Section 1973b(f)(2), the provision referred to in § 1973, provides that "no voting qualification or prerequisite to voting . . . shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group."

> Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed – usually to defeat the minority's preferred candidate.

Id. at 50-51 (citations and footnotes omitted).

Additionally, the Court identified the following factors, listed in the Senate Report, as typically relevant to a vote dilution inquiry:

> the history of voting-related discrimination in the State or political subdivision; the extent to which voting in the elections of the State or political subdivision is racially polarized; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. at 44-45. Two other factors listed in the Senate Report also were said to have probative value in some cases:

> evidence demonstrating that elected officials are unresponsive to the particularized needs of the members of the minority group and that the policy underlying the State's or the political subdivision's use of the contested practice or structure is tenuous.

Id. at 45.

Despite the apparent comprehensiveness of the foregoing factors, the Court accepted the Senate Report's view that the list is neither exclusive nor comprehensive, that no specified number of factors need be proved, and that it is not necessary for a majority of the factors to favor one position or another. *See id.* The Senate Report does, however, provide important guideposts for the factual analysis to be undertaken by the trial court. Accordingly, although the three *Gingles* preconditions generally must be satisfied, their satisfaction is not alone sufficient to make out a Voting Rights Act violation. *See Johnson v. DeGrandy*, 512 U.S. 997, 1013, 114 S. Ct. 2647, 129 L. Ed. 2d 775 (1994). The "totality of the circumstances" test prescribed by the statute must also be applied to the evidence, since "the ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts." *Id.* at 1011. The Supreme Court has made it clear that resolution of the question of vote dilution is a fact intensive enterprise to be undertaken by the district court. And while we are required to see to the proper application of governing legal principles under a de novo standard of review, we are constrained to apply a clearly erroneous standard of review to the district

court's ultimate findings of vote dilution, thereby "preserving the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law." *Gingles*, 478 U.S. at 79.

The district court made careful factual findings in determining that the three *Gingles* preconditions had been satisfied in the case at bar. The first precondition – a sufficiently large and geographically compact minority group – was found satisfied through the testimony of Dr. Beveridge, the districting expert for the plaintiff class. *See Goosby I*, 956 F. Supp. at 348. His division of the Town into six voting districts produced one district consisting of the Town's four predominantly black communities. This proposed District 3 was found to be more compact than the average congressional district. *See id.* at 349. The second precondition – a politically cohesive minority group – was not disputed in the district court. *See id.* at 350. Moreover, Dr. McDonald, another expert for the plaintiff class, opined that "one could reasonably expect that a candidate preferred by black voters could win in a single-member district system." *Id.* at 334. On appeal, the Town does not challenge the district court's finding as to the first two *Gingles* preconditions. Those findings, in any event, are fully supported in the record.

The Town contends that the third *Gingles* precondition – that the white majority votes sufficiently as a bloc usually to defeat the preferred candidate of the minority – has not been satisfied. This contention is not, however, bottomed on a lack of evidence of "sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice." *Voinovich v. Quilter*, 507 U.S. 146, 158, 122 L. Ed. 2d 500, 113 S. Ct. 1149 (1993).

Indeed, the district court found racially polarized voting on the basis of the following undisputed facts: (1) a black Democrat candidate who ran for the Town Board always was the most preferred candidate among black voters; (2) the black Democrat received over 50% of the black vote in every election but one; (3) in every Town board election but one there was at least one minority-preferred candidate; and (4) every minority-preferred candidate for the Town Board lost to the majority-preferred candidate as a result of white voters voting for candidates not supported by black voters. *Goosby I*, 956 F. Supp. at 351.

The contention of the Town in regard to the third *Gingles* precondition revolves around the argument that lies at the heart of its appeal – that political partisanship is the reason that white bloc voting occurs in Town elections. According to the Town, white bloc voting patterns cannot be legally significant under the third *Gingles* precondition where the divergent patterns are not attributable to race but to partisan affiliation. The Town of course asserts that the historical white bloc voting pattern in Town elections is merely an expression of political partisanship – the vast majority of white voters in the Town have voted Republican since time immemorial. The response to that argument at this point in the analysis is that inquiry into the cause of white bloc voting is not relevant to a consideration of the *Gingles* preconditions. In this, we agree with the Fourth Circuit's reading of *Gingles*.

We think the best reading of the several opinions in *Gingles*, however, is one that treats causation as irrelevant in the inquiry into the three *Gingles* preconditions, *see Gingles*, 478 U.S. at 62, 106 S. Ct. at 2772 (Brennan, J.,

plurality opinion) but relevant in the totality of circumstances inquiry, *see* 478 U.S. at 100, 106 S. Ct. at 2792 (O'Connor, J., concurring in judgment) (agreeing that use of racial polarization data "solely" to prove *Gingles* second and third elements cannot be rebutted by "evidence that the divergent racial voting patterns may be explained in part by causes other than race," but disagreeing with plurality's claim "that such evidence can never affect the overall vote dilution inquiry."). *Lewis v. Alamance County, N.C.*, 99 F.3d 600, 616 n.12 (4th Cir. 1996); *see also Milwaukee Branch of the NAACP v. Thompson*, 116 F.3d 1194, 1199 (7th Cir. 1997) (reasons why candidates preferred by black voters lost should be considered in totality of circumstances inquiry); *Vecinos De Barrio Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995) (non-racial reasons for divergent voting patterns to be considered under totality of circumstances test); *Nipper v. Smith*, 39 F.3d 1494, 1524 (11th Cir. 1994) (in order for plaintiff to prevail where defendant offers proof that voting patterns can best be explained by non-racial circumstances, showing must be made under totality of circumstances that minority group denied meaningful access to political process).

We therefore ratify the approach taken by the district court to consider the political partisanship argument under the "totality of circumstances" analysis rather than as part of the third *Gingles* precondition. *See Goosby I*, 956 F. Supp. at 337, 355. The Town has made no showing that the factual findings of the district court supporting satisfaction of the third *Gingles* precondition are clearly erroneous. The conclusion that there was legally sufficient bloc voting to defeat minority-preferred candidates in the

Town is reinforced by application of the following bright-line rule that we announced and applied in *City of Niagara Falls*, 65 F.3d at 1019:

> For purposes of analyzing the third prong of *Gingles*, in § 2 cases in which the plaintiffs seek to replace an at-large, multimember electoral system with a series of single-member districts of which one or more would be a so-called majority-minority district, a candidate cannot be "minority-preferred" if that candidate receives support from fewer than 50% of minority voters. When a candidate receives support from 50% or more of minority voters in a general election, a court need not treat the candidate as minority-preferred when another candidate receiving greater support in the primary failed to reach the general election. Finally, even if a candidate receives 50% or more of the minority vote, a court need not treat the candidate as minority-preferred if another candidate receives significantly higher support.

No winning candidate ever has received 50% of the minority vote in general elections in the Town, and there have been no Republican primary elections there. Thus, the third *Gingles* precondition is established because the white majority always has voted sufficiently as a bloc to defeat the preferred candidate of the minority.

The district court undertook an extensive examination of the factual circumstances of this case in their totality, making specific findings as to each of the Senate Report factors. *See Goosby I*, 956 F. Supp. at 337-48. With respect to the history of racial discrimination, the district court found that the former state election law provision requiring the purging of voters who failed to vote in four

successive years had a discriminatory impact on black voters. *See id.* at 337-38. Apparently, the rate of purging was 56% greater in predominantly minority election districts than in predominantly white districts, and a black registrant in the 18th Assembly District had a 70% greater chance of being purged for non-voting than a randomly selected registrant from one of the other assembly districts in the Town. The purging ceased in 1990 following the issuance of a temporary restraining order and the Town's subsequent consent to permanent injunctive relief. The district court also found it to be a "fair inference" that a literacy test administered in Nassau County during the years 1922-1969 had a discriminatory impact on blacks. *Id.* at 338. Addressing the degree of polarized voting, the district court found from the data submitted that the successful candidate at every Town election from 1983 to 1993 received between 15% and 29% of the black vote and between 49% and 62% of the white vote. (Curtis Fisher actually received 29.5% of the black vote in 1993, the highest percentage for any prevailing candidate in any Town Board election.) The district court found a "persistent and significant degree of racial polarization in Town Board elections." *Id.*

As to electoral mechanisms that enhance vote dilution, the district court found that the size of the Town, one of the largest undivided voting districts in the nation, makes campaigning much more difficult. *See id.* at 339. Campaign financing is especially difficult in such a large district for black candidates, who have been able to campaign more effectively in smaller districts in Nassau County. The lack of access to the candidate slating process is a factor that the district court examined in great

detail, making extensive factual findings that will be discussed later in this opinion. *See id.* at 339-40. Suffice it to say at this point, those findings are well-supported by all the testimony bearing on this factor and support the conclusion that "Town Board seats were sufficiently beyond the realm of possibility for black Republicans that they never even attempted to obtain one through the normal party mechanisms until 1993. And then they were simply shut out." *Id.* at 341.

In connection with discrimination in other areas which hinders blacks' ability to participate in the political process, the district court examined the socioeconomic status of blacks who reside in the Town and the relationship between that status and participation in the political process. *See id.* at 342. Despite a finding of some income differential and disparity in educational levels, the district court concluded that "differences in the socioeconomic status of blacks do not significantly impair their relative ability to participate in the political process." *Id.* Although not present in recent years, racial appeals have found their way into political campaigns in the area. Anti-black sentiment was manifested in literature warning of the spillover of urban crime from New York City, which was perceived as a promise to keep blacks from crossing the border into Nassau County. *See id.* at 343. The district court identified a "pattern of Republican campaign materials that were characterized by subtle racial appeals, which sought to depict the integration of white areas as a threat, and to prey on the fear of such a threat." *Id.*

Assessing the factor of minorities elected to public office, the district court found that only one black was

elected to Town office since the establishment of the Town Board. That one was Curtis Fisher, a Republican who was appointed to the Board in 1993 and elected the same year. Although black Republicans have been appointed or elected to other offices in the surrounding area, and blacks have been appointed to a number of positions in the Town, the fact remains "that until the election of Curtis Fisher in 1993, no African-American was ever elected to the legislative body at issue in this case." *Id.* at 344. According to the district court, there is substantial evidence that the Town Board has not been responsive to the particular needs of the Town's black community. *See id.* at 344-46. Supporting this conclusion are a number of findings – the lack of an affirmative action policy; the failure to take action in a case involving racial slurs in the workplace; the failure to respond to a complaint of race discrimination in employment that ultimately resulted in a judgment against the Town; the denial or disregard of funding requests for community centers in the black communities; the lack of training for the Town's Affirmative Action Officer; and the insensitivity of the Town Board to evidence of racism in a village fire department for which the Town provides financial support.

The last of the Senate Report factors listed (the second of the two additional factors said to have probative value) is the tenuousness of the policy underlying at-large elections. As to that factor, the district court determined that the purported advantages cited by the Town in support of the at-large system – the drawbacks of

"more government"; the difficulties residents would suffer if a weak representative were elected from their district; and a parochial approach to Town government – were tenuous. Specifically, the district court found that the black communities in the Town do not have a Town Board member accountable to them under the present system. *See id.* at 347. The Town Supervisor assigns responsibility for portions of the Town to Board members, but the district court found that "the Councilmembers, who in most instances ignore the concerns of the black communities, can afford to do so because they can count on receiving sufficient votes from other areas to keep their seats on the Town Board." *Id.* The court found it significant that Curtis Fisher, who does not reside in a black community, was assigned responsibility as a Town Board member for Lakeview, a predominantly black community. *See id.* The most tenuous aspect of the defense of the at-large system, according to the district court, was the contention that it results in better government for the black communities. *See id.* Under standards established for review of factual findings, we cannot say that any finding made by the district court in its review of the Senate Report factors is clearly erroneous.

Whether brought forward under the third *Gingles* precondition or under the totality of circumstances test, the principal and pervasive argument of the Town is that political partisanship, rather than race, accounts for the defeat of black candidates. The Town puts it this way on page 2 of its Brief: "The Town contends that blacks have lost as Democrats, not as 'blacks.' Because plaintiffs never attempted to establish that blacks' inability to elect Democrats was tied to their race, plaintiffs' claim of racial vote

dilution was a mere euphemism for defeat at the polls and legally insufficient." The foregoing represents a fundamental misunderstanding of what the plaintiff class alleged and proved to the satisfaction of the district court. The claim was that the at-large system of voting made it impossible for blacks to elect their preferred candidates. The Town's argument implies that if blacks registered and voted as Republicans, they would be able to elect the candidates they prefer. But they are not able to elect preferred candidates under the Republican Party regime that rules in the Town. Moreover, blacks should not be constrained to vote for Republicans who are not their preferred candidates.

The Supreme Court instructs that a Voting Rights Act violation occurs when "a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47. The electoral law at issue provides for at-large voting for Town Board members. The historical conditions implicated are the Republican Party's hegemony over the Town of Hempstead since the Town's inception over 90 years ago, the slating process by which candidates are selected by the Republican Party, and the predilection of the great majority of blacks to vote for Democrat candidates. The concatenation of these conditions has resulted in the vote dilution of which the plaintiff class complains and the consequent inability of blacks to elect their preferred candidates.

The Republican slating process in the Town is unique. Although the Republican Committee members in the Town of Hempstead theoretically are empowered to

choose a slate of candidates for the Town Board, the actual selection process has been much different. The Committee members have ceded their authority to the County Chairman, who designates the Town slate. The choice of candidates is his alone, although any number of people may suggest potential candidates. The present Nassau County Chairman, Joseph Mondello, has served in that capacity for some fifteen years. While black Republicans could mount a primary campaign to secure the Republican nomination for Town Board for a preferred candidate, it would be futile to do so. The Chairman-preferred candidate would always win in a Town-wide primary election, due to the overwhelming strength of the monolithic Republican organization. In any event, black Republicans had never even attempted to secure a nomination for a preferred candidate through normal party procedures until 1993. The events of that year reveal the one-man, no-vote mechanism that prevails in the Republican Party in the Town of Hempstead and in the County of Nassau.

When the Board vacancy occurred in 1993, the NCAARC advanced the name of Lance Clark, a black attorney who then was serving as Deputy Mayor and Trustee of the Village of Hempstead. The pressure had been on to get a black-preferred member of the Town Board since black Republican leaders marched on the Town Hall demanding such action in 1989. Clearly, Clark was the preferred candidate of the black Republicans and the black community. Nevertheless, Chairman Mondello, who then served as Presiding Supervisor of the Town as well as Nassau County Republican Chairman, saw to the appointment of Curtis Fisher, a black crony, to fill the

vacancy and to be nominated and elected later that year to serve on the Town Board.

Without access to the Republican slating process, blacks simply are unable to have any preferred candidate elected to the Town Board, given the historical success of the Republican Party in all Town Board elections. This stands in sharp contrast to the situation described in *League of United Latin American Citizens ("LULAC") v. Clements*, where minority candidates were slated by both parties. *See* 999 F.2d 831, 861 (5th Cir. 1993); *see also Clarke v. City of Cincinnati*, 40 F.3d 807, 812-13 (6th Cir. 1994) (finding no unlawful vote dilution when 47% of minority-preferred candidates were elected under at-large system). Because it could be said that white voters, both Democrat and Republican, supported minority candidates elected by their parties at levels equal to or greater than those of white candidates, it was proper to conclude in that case "that divergent voting patterns among white and minority voters are best explained by partisan affiliation." *LULAC*, 999 F.2d at 861. Such is not the case here, although the Town argues otherwise. Due to the county chairman's control of the slating process and without an open Republican primary, black Republicans have been unable to advance their preferred candidates as nominees for the Town Board. *Cf. id.* Without the Republican nomination, black-preferred candidates cannot be elected to the Town Board.

The Town directs our attention to the election of several black Republicans who have been elected to judicial office in districts that have included the Town. Other blacks have been elected to office in districts comprised of segments of the Town. As to those elections, we agree

with the proposition that "exogenous elections – those not involving the particular office at issue – are less probative than elections involving the specific office that is the subject of the litigation." *Clark v. Calhoun County, Miss.*, 88 F.3d 1393, 1397 (5th Cir. 1996). Moreover, with respect to the election of two black Republicans to judicial office in District No. 2 of the Nassau County District Court, consisting of the Town and the City of Long Beach, it appears that one of those candidates was not black-preferred, and the record does not indicate whether the second candidate was preferred. The two blacks elected as Justice of the New York State Supreme Court in the Tenth Judicial District, including all of Nassau and Suffolk Counties, were nominated by a convention of delegates selected from the entire Judicial District.

With respect to the election of blacks to the Office of Member of Assembly in the 18th Assembly District, Mayor of the Village of Hempstead, Trustee and Deputy Mayor of the Village of Hempstead and Representatives to the Nassau County Legislature, the segments of the Town from which these black-preferred officeholders were elected have a predominantly black population. This fact cuts in favor of the relief afforded by the district court – the division of the Town into single-member election districts with one minority-majority district.

Reverting to the elements of a Voting Rights Act violation set forth at the beginning of this Discussion, and applying them to the proof in this case, it can be seen that (1) the at-large voting practice (2) imposed by the Town of Hempstead (3) operates in a manner that abridges the rights of blacks to vote (4) on account of race. The totality of the circumstances demonstrates that (1) the political

processes for nomination and election in the Town of Hempstead (2) are not equally open to participation by members of the protected class (3) because the class members, owing to exclusion from the Republican slating process and the historical primacy of the Republican Party in Town government, have less opportunity than others (whites) to participate and elect representatives of their choice. The subsidiary factual findings made by the district court fully support its ultimate finding on the question of vote dilution. Because we have no basis upon which to conclude that the ultimate finding is clearly erroneous, we cannot disturb it. *See City of Niagara Falls*, 65 F.3d at 1008. Finally, we agree with the district court's rejection of the Town's partisan politics argument:

> In evaluating all of the relevant facts as a whole, including the size of the Town, the absence of geographic subdistricts, the lack of access by blacks to the Republican Party slating process, the unfortunate use of racial appeals in political campaigns, the lack of responsiveness by the Town Board to the particularized needs of the black communities, and the stated desire by the Town government to cling to a monolithic, single-voice legislature for a heterogeneous population consisting of many difference communities and voices, I conclude that black citizens' failure to elect representatives of their choice to the Town Board is not best explained by partisan politics.

Goosby I, 956 F. Supp. at 355.

In formulating a remedy, the district court rejected the Town's favored plan – a two-district system with one single-member district encompassing one-sixth of the

Town's population and a majority of the Town's black population, and a second five-member district for the other five-sixths of the population. *See Goosby II*, 981 F. Supp. at 754. This course was properly rejected by the trial court, since race was the predominant factor motivating the plan. Where a jurisdiction's plan is motivated by race, strict scrutiny applies, and the plan is unconstitutional unless its challenged features are narrowly tailored to serve a compelling state interest. *See Bush v. Vera*, 517 U.S. 952, 962, 135 L.Ed.2d 248, 116 S. Ct. 1941 (1996). The Town's plan for a two-district division does not meet the test. The district court found that

> the segregation effected by the Town Board's two-district plan is almost total. Ninety-seven percent of the black voters in the Town of Hempstead are placed in District 1, which has an overall population that is over 58% black. By contrast, District 2, (i.e., the balance of the Town) is over 97% non-black.

Goosby II, 981 F. Supp. at 759 n.7. The court found that the sole motivating factor for the two-district political division was race. While holding that remedying a Voting Rights Act violation is a compelling state interest, the court concluded that the proposed plan was violative of the Fourteenth Amendment. *See id.* at 761. We agree that the two-district plan is so unusual and bizarre that it clearly cannot fulfill the "narrowly tailored" requirement.

Although the district court found that race was the sole factor motivating the two-district plan, it also found that race played a role, but was not the predominant factor, in the six-district plan. The latter plan was found to be in accordance with traditional districting principles

and that race consciousness was a subordinate factor. *See id.* at 762. We agree with the district court that, even if the six-district plan required strict scrutiny, it is in any event narrowly tailored to the goal of remedying the vote dilution found here. It includes six reasonably compact districts that are normal in shape and approximately equal in size of population. It respects local community boundaries, and racial considerations were addressed only insofar as necessary to remedy the violation. We think that the six-district plan is an entirely appropriate remedy under the circumstances.

CONCLUSION

We affirm the judgment of the district court in all respects, including that portion of its order that provides for the district court to establish a schedule for a special election in accordance with the foregoing.

CONCUR BY: LEVAL

CONCUR:

LEVAL, Circuit Judge, concurring:

I also vote to affirm the judgment of the district court, but for slightly different reasons.

The Town contends that some racial motivation is necessary to show a violation of section 2 of the Voting Rights Act. It asserts that plaintiffs failed to show any such motivation because black voters' lack of success in electing candidates of their choice is attributable solely to political preferences: The Town historically has been and remains overwhelmingly Republican, while black voters

have tended to vote for Democrats who have lost. Plaintiffs and their amici contend that section 2 does not require racial motivation. They further contend that, if racial motivation is needed, the need is satisfied: Although the at-large district was not created to achieve race-based goals, it effectively combines with racial animus to deprive black voters of equal participation in the political process.

As enacted in 1965, section 2 prohibited a voting mechanism "imposed or applied by any State or political subdivision to deny or abridge the right of any citizen . . . to vote on account of race or color." Voting Rights Act of 1965, 79 Stat. 437 (current version at 42 U.S.C. § 1973). In 1980, a plurality of the Supreme Court interpreted that text to go no further than the Fifteenth Amendment, and to prohibit only electoral mechanisms intentionally adopted or maintained by state officials for a racially discriminatory purpose. *See City of Mobile v. Bolden*, 446 U.S. 55, 61, 65, 64 L. Ed. 2d 47, 100 S. Ct. 1490 (1980) (plurality opinion). In 1982 Congress amended the act, apparently to reject the *Bolden* interpretation. *See Thornburg v. Gingles*, 478 U.S. 30, 35, 92 L. Ed. 2d 25, 106 S. Ct. 2752, (1986). While making clear that the statute no longer requires discriminatory intent by a state actor, the amendment clarified little more. It is exceedingly difficult to discern what the amended statute means.[1]

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[1] The act now reads:

(A) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of

Subsection (a) of the amended statute retains the original statute with one significant change. Where the original act had addressed voting mechanisms "imposed or applied to deny or abridge the right . . . to vote on account of race or color," the new version reaches mechanisms "imposed or applied . . . in a manner which results in a denial or abridgement of the right . . . to vote on account of race or color." This substitution clearly diminishes the importance of motivation and focuses more on result. Retention of the words "on account of race or color," however, suggests a continuing concern for race-based motivation, at least within the electorate.[2] (I

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the right of any citizen of the United States to vote on account of race or color . . . , as provided in subsection (b) of this section.

(B) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to the participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973.

[2] Some courts find that a requirement of racial animus survives the 1982 amendment, and can be satisfied by racial motivation on the part of the electorate, rather than the state.

recognize that courts have sometimes construed similar language not to require proof of race-based intent. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 28 L. Ed. 2d 158, 91 S. Ct. 849 (1971) (construing section 703(a)(2) of Title VII, 42 U.S.C. § 2000e-2(a)(2) – which prohibits adverse employment actions "because of" an individual's race – to reach job requirements that unnecessarily have a "disparate impact" on a minority group).)

The 1982 amendment also added a new subsection (b). The first sentence of subsection (b) asserts that a violation of subsection (a) is established "if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by [the class of persons] protected by subsection (a) . . . in that its members have less opportunity than [others] to participate in the political process and to elect representatives of their choice." Under this structure, a showing that satisfies subsection (b) is deemed to satisfy subsection (a). Subsection (b) is satisfied by a showing "the political processes leading to nomination or election are not equally open" to persons of a race or color "in that [they] have less opportunity than [others] to participate in the political process and to elect representatives of their choice."

This standard is exceptionally vague. One has almost no guidance as to what illegally lessens the opportunity to vote. Following the Senate Report, the Supreme Court has directed courts to consider multiple factors, in "the

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See, e.g., Nipper v. Smith, 39 F.3d 1494, 1524-25 (11th Cir. 1994) (en banc) (opinion of Tjoflat, C.J.); *LULAC v. Clements*, 999 F.2d 831, 859-63 (5th Cir. 1993) (en banc).

totality of the circumstances," in determining whether section 2 has been violated. *See Johnson v. De Grandy*, 512 U.S. 997, 1010 & n.9, 114 S. Ct. 2647, 129 L. Ed. 2d 775 (1994) (quoting *Gingles*, 478 U.S. at 44-45 (citing S. Rep. No. 417, 97th Cong., at 28-29, *reprinted in* 1982 U.S.C.C.A.N. 177, 205-06)). The specified factors, however, give little guidance as to what constitutes a violation of the act.

The last sentence of subsection (b) and its proviso add further confusion, particularly where, as here, plaintiffs' claim is based largely on their lack of success in electing their preferred candidates. The sentence states that "the extent to which members of a protected class have been elected . . . is one circumstance which may be considered." The proviso goes on to say, however, that the statute confers no "right to have members of a protected class elected in numbers equal to their proportion in the population."

Probably the result of a political impasse in Congress, these provisions are especially confusing. They might be read to state two forceful propositions that point in opposite directions and thus cancel each other out: First, minority voters' failure to elect representatives in proportion to their population can be highly significant in establishing a violation – but second, there is no right to achieve proportional success. Alternatively, the provisions may simply state self-evident propositions. The main clause says that the success or failure of minority candidates "may be considered" in deciding whether members of that minority have had "less opportunity [than others] . . . to participate in the political process and to elect representatives of their choice." The proviso,

meanwhile, might merely state one of two reasonably obvious propositions: that the requirements of the statute do not go so far as to guarantee strict proportionality of representation, or that the failure of members of a protected class to elect candidates of their class may result from voters of that class voting for candidates who are not of that class, so that the election of few members of a minority might say little about the overall opportunity of class members to participate. *See NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1015 (2d Cir. 1995). The last sentence and proviso therefore either cancel each other out or assert nothing of significance.

The relevance of race-based intent to a violation of subsection (b) is especially unclear under the amended act. To satisfy subsection (b), a plaintiff must show that persons of plaintiff's class "have less opportunity than others to participate in and elect representatives of their choice." In some instances, such lesser opportunity clearly could result from procedures imposed without racial motivation. An easy case of a violation might occur where established polling places are geographically inaccessible to a new settlement of voters in a protected class. *Cf. Perkins v. Matthews*, 400 U.S. 379, 387-88, 27 L. Ed. 2d 476, 91 S. Ct. 431 (1971). On the other hand, in other circumstances, the lessening of a protected class's opportunity might result solely from race-based animus. For example, even when members of a protected class have an equal opportunity to cast ballots, race-motivated actions by nominating committees or majority voters might lessen the opportunity for members of the minority to elect their choice of representatives. *See White v. Regester*, 412 U.S. 755, 766-69, 37 L. Ed. 2d 314, 93 S. Ct. 2332,

(1973). It thus appears that some violations of subsection (b) might require race-based intent on the part of officials or voters, but others would not.

The Supreme Court has offered no definitive guidance on the role of discriminatory intent under section 2. In *Gingles*, four Justices understood section 2 to require no showing of racial intent. *See* 478 U.S. at 61-74 (plurality opinion). But five Justices expressed different views. *See id.* at 83 (White, J., concurring); *id.* at 100-01 (O'Connor, J., concurring). Subsequent decisions have not clarified the issue. Section 2 has been aptly described as a "compromise that seeks to have things both ways." *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 359 (7th Cir. 1992). Interpreting such a statute is a particular challenge. One approach to statutory interpretation tells judges to rely only on the text and a dictionary. However valuable that approach may be when statutes contain decipherable instructions as to a particular question, the approach is of no use when a statute contains no such guidance. In some instances, either because Congress was internally divided or because it lacked a clear idea how a general principle should play out in the specifics, a statute simply leaves the major questions unanswered. In those cases, a special relationship arises between Congress and the courts. Having left open the inevitable questions, Congress enters a partnership with the courts, assigning them the task of supplying answers based on common sense and good judgment in giving effect to the incompletely formulated intentions and apparent compromises of the statute. The Sherman Act is one vague statute whose general terms require courts to play an especially active interpretive role. *See* 15 U.S.C. § 1 (1999)

("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."). Even more than in the Sherman Act, which at least contains a clear general message, in the Voting Rights Act Congress has assigned the courts such a partnership role.

On the issue of intent, Justice Brennan's plurality opinion argued that the statute intended to reject any requirement of racial animus. *See Gingles*, 478 U.S. at 61-74. The opinion pointed to observations in the Senate Report of two significant disadvantages to such a requirement: first, that attempts to prove racial animus in litigation would likely have a divisive effect; and second, that racial animus is often difficult to prove, so that such a requirement might allow some violations to escape redress. *See id.* at 71-73.

While these observations are surely accurate, there are important countervailing considerations. Difficulty proving racial animus in some circumstances may result from the fact that there was none. For courts to find violations and invalidate elections and election procedures in the absence of any racial motivation, merely because a protected class can show it has had little success electing candidates, could produce enormous disruptions in the political process.[3] As the majority report

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[3] Consider, for example, a case in which a district line was set long ago and has since been maintained without any racial motivation. In recent years, a cluster of members of a protected class develops around the dividing line, with a substantial percentage of the cluster falling on both sides of the line. If the

indicates, this was not Congress's intent. *See* S. Rep. No. 417, at 35, *reprinted in* 1982 U.S.C.C.A.N. at 213 (stating that the act "will not result in wholesale invalidation of electoral structures").

In my view, the more deeply judicial intervention would intrude into the political process, the more reluctant courts should be to find a violation without a finding of racial motivation. For example, in a circumstance discussed above, the act might require the establishment of a polling place near a new concentration of protected class members, even though the location of polling places had not been racially motivated, if the inaccessibility of the polling place lessened the opportunity of class members to cast ballots. Such a remedy involves little judicial intrusion into the political process. On the other hand, where the complaint essentially alleges that voters of the protected class have had little success electing candidates of their choice, and where correction would require radical political restructuring – either by redrawing district lines or by changing the nature of representation from at-large to single-representative districts – I believe courts should not find a violation in the absence of race-based

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members of that class could not elect their preferred representative in the districts on either side of the line, but could elect a representative if the line were shifted so that the entire community fell into one district, then plaintiffs from that class could argue that the maintenance of the line deprived them of the opportunity to elect a representative of their choice. In such a circumstance, the notion that courts could invalidate an election and require revision of election districts, without any showing of discriminatory intent, seems to me alarming and far beyond the probable contemplation of Congress.

intent. *See* S. Rep. No. 417, at 21, *reprinted in* 1982 U.S.C.C.A.N. at 198 (citing with approval the holding of *Whitcomb v. Chāvis*, 403 U.S. 124, 153, 29 L. Ed. 2d 363, 91 S. Ct. 1858 (1971), that absent "built-in bias" against blacks, the "cancelling out" of black votes constitutes a "mere euphemism for political defeat at the polls," not a Voting Rights Act violation).[4] I therefore reject the plaintiffs' argument that Hempstead's long-standing multi-member district at-large can violate the plaintiffs' rights under section 2 absent race-based intent on the part of either Hempstead's officials or its voters.

Requiring discriminatory intent to prove vote dilution reduces the otherwise serious tension between section 2 and constitutional principles. Prohibiting the

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[4] In deciding whether or not discriminatory intent is necessary to a section 2 violation, another factor that may be relevant is whether the alleged violation appears more concerned with process or outcomes. The accessible location of polling places, for example, is necessary to a fair process in which all persons can cast a vote. The law may plausibly guarantee a fair process regardless whether the unfairness to be remedied is the product of discriminatory intent. But where plaintiffs allege that they are unable to elect representatives of their choice, their complaint, at least on its face, is that the outcome is unfavorable to them. Ordinarily, American law guarantees equal electoral opportunity, not equal electoral results. *See Davis v. Bandemer*, 478 U.S. 109, 131-33, 92 L. Ed. 2d 85, 106 S. Ct. 2797 (1986); *Baird*, 976 F.2d at 359. If courts are to police electoral outcomes, it is reasonable that they first require that discrimination, within the electorate if not the state, have infected the election. When discrimination is present, it can be said that the process also was not fair, in the sense that it was marred by illegitimate animus. For this reason, when a complaint appears to allege only bad outcomes, it makes sense to require discriminatory intent.

electoral process from effectuating discriminatory animus is entirely consistent with the nation's commitment " 'to confront its conscience and fulfill the guarantee of the Constitution' with respect to equality in voting." *Bush v. Vera*, 517 U.S. 952, 992, 135 L. Ed. 2d 248, 116 S. Ct. 1941 (1996) (O'Connor, J., concurring) (quoting S. Rep. No. 417, at 4, *reprinted in* 1982 U.S.C.C.A.N. at 181). However, entitling a unified racial minority to elect a representative of its choice, even when the minority's electoral defeats have nothing to do with racial animus, creates an inappropriate inducement to vote according to race rather than ideas. If the Voting Rights Act is read to create a remedy where there is no proof in a particular case that past or present discrimination causes bloc voting, then the act arguably "threatens to carry us further from the goal of a political system in which race no longer matters – a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Shaw v. Reno*, 509 U.S. 630, 657, 125 L. Ed. 2d 511, 113 S. Ct. 2816 (1993).

The next question is how a court should analyze race-based intent. In my view the concerns discussed by Justice Brennan's *Gingles* opinion can be appropriately accommodated, without excessive judicial intrusion into the electoral process, by burden-shifting. In order to establish a prima facie case of vote dilution, plaintiffs must prove the three "necessary preconditions" to a section two violation under *Gingles*: that the minority group is large and compact enough to constitute a majority in a single-member district; that the minority is politically

cohesive; and that the majority ordinarily votes sufficiently as a bloc to defeat the minority preferred candidate. *See Gingles*, 478 U.S. at 50. Proof of those three factors sufficiently supports an inference that race may have been a motivating factor to justify imposing on defendants the burden to prove that the regular defeat of minority preferred candidates is not the result of race-based intent on the part of the governing officials of the electorate. *Cf. Vecinos De Barrio Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995). On this issue, a defendant can ultimately prevail by showing, in the "totality of the circumstances," *Johnson*, 512 U.S. at 1011, that the lessening of plaintiffs' opportunity to elect their preferred candidate did not result from race-based intentions.

Although the district court proceeded on a different understanding of section 2, the court's judgment must be affirmed under these standards. The court found that the three *Gingles* preconditions were satisfied: The black minority in Hempstead is large and compact enough to form a majority in a single-member district; the minority is politically cohesive, as it is heavily Democratic; and the white majority, which is heavily Republican, has always voted as a bloc that defeats the minority's preferred candidates in Board elections. Those findings are supported by the evidence, and they placed the burden of proving that race was not a motivating factor upon the defendants.

Based on the district court's factual findings, none of which is clearly erroneous, I cannot say that defendants carried their burden of disproving racial motivation. Judge Gleeson made a number of findings indicating that race is a factor in the politics of Hempstead. Racial

appeals have been features of Town elections on more than one occasion. Town law enforcement officers have engaged in race-conscious policing – essentially telling black youths visiting from Queens to "go back where they belong." Agencies of the Town government have committed acts of racial discrimination to which the Town has made no response. And the Town has a history of indifference to the economic and social needs of the black communities within Hempstead, even though they have lower incomes than the rest of the Town.

It is true that blacks were sometimes elected in Hempstead, but they were elected to positions other than the Town Board, from geographical areas other than the Town proper. This is not enough to establish that race was not a motivating factor in elections for the Town Board, especially in the "comprehensive, not limited, canvassing of relevant facts" that the act requires. *Johnson*, 512 U.S. at 1011. Until this litigation began, the Republican Party in Hempstead had never recruited an African-American candidate for the Town Board – a fact that distinguishes both *LULAC*, 999 F.2d at 861, and *Baird*, 976 F.2d at 361. Furthermore, a majority of white voters in Hempstead had never supported a black candidate for the Board – another difference from *LULAC*, 999 F.2d at 861. After this litigation began, the Republican Party did choose a black candidate, but he was not supported by the majority of blacks active in the Republican Party. His selection hardly eases fears, engendered by the history, that black voters in Hempstead have less political influence than similarly situated white voters. *See Solomon v. Liberty County Comm'rs*, 166 F.3d 1135, 1143 (11th Cir. 1999).

In the totality of the circumstances, the defendants failed to show that racial motivation was not a cause of blacks' persistent defeat at the polls. As Judge Gleeson noted, it appears that in Hempstead, "race-neutral factors, such as political partisanship . . . co-exist with race-based ones, such as diminished access to the slating process or insensitivity by elected officials to the particularized needs of the minority community." Under section 2, it is necessary to find only that (1) the complete failure of blacks to elect the candidates of their choice to the Town Board, despite their electoral cohesiveness and strength, satisfied the plaintiffs' burden on the first three elements of a violation through vote dilution, and (2) defendants' evidence failed to demonstrate the absence of race-based intentions as a contributing cause. I believe plaintiffs proved a section 2 violation.

Dorothy GOOSBY, Samuel Prioleau, Xavier Morales, and Miladys Morales, Plaintiffs,

v.

TOWN BOARD OF THE TOWN OF HEMPSTEAD, NEW YORK, Gregory P. Peterson, Richard A. Zagarino, Curtis Fisher, Joseph Ra, Anthony Santino, Joseph Kearney, in their official capacities as members of the Town Board of the Town of Hempstead, Nassau County Board of Elections, John DeGrace and Steven Sabbeth, in their official capacities as Commissioners of Elections of Nassau County, Defendants.

No. 88 CV 2453 (JG).

United States District Court,
E.D. New York.

Feb. 20, 1997.

Frederick K. Brewington, Hempstead, NY, Randolph M. Scott-McLaughlin, Center for Constitutional Rights, New York City, for Plaintiffs.

Joseph J. Ortego, Evan H. Krinick, Kenneth A. Novikoff, Rivkin, Radler & Kremer, Uniondale, NY, for Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

GLEESON, District Judge:

This is an action brought under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and the First, Thirteenth, and Fourteenth Amendments to the United

States Constitution. Plaintiffs, African-American[1] citizens of the Town of Hempstead (the "Town"), challenge the at-large voting practice used in the Town to elect the six Councilmembers who sit on the Town Board of the Town of Hempstead (the "Town Board"). Plaintiffs contend that this system dilutes the voting strength of the minority population in the Town in violation of the Voting Rights Act, and seek an order directing the implementation of a single-member district election system.

The complaint was filed on August 8, 1988. On November 16, 1994, the case was reassigned to this Court. Discovery was completed in February 1996. Defendants moved for summary judgment, which motion was argued and denied on April 5, 1996. A three-week bench trial was held in July 1996, and closing arguments by counsel were heard on August 14, 1996.

This decision is arranged in three parts. Part I sets forth a brief overview of the legal principles governing claims under Section 2 of the Voting Rights Act. Part II sets forth my findings of fact. Part III sets forth my conclusions of law.

I conclude that plaintiffs have established a violation of Section 2 and are entitled to the relief they seek.

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[1] The terms "African-American" and "black" were used interchangeably by both parties throughout the trial, as they are here. Although there is a small percentage of the population of the Town of Hempstead that is Hispanic black, both sides agree that it is not large enough to significantly affect the relevant statistics in this case. Claims on behalf of a subclass of Hispanic citizens have been withdrawn.

I. OVERVIEW OF THE LEGAL PRINCIPLES GOVERNING CLAIMS UNDER SECTION 2 OF THE VOTING RIGHTS ACT

Section 2 of the Voting Rights Act of 1965, as amended, reads in pertinent part as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . . .
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered:
>
> *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (1994). There is no dispute that the at-large system for electing the members of the Town Board is an electoral practice that is subject to challenge under

Section 2. In addition, it is clear that the 1982 amendments to Section 2 rejected the plurality opinion in *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980), which sought to impose on Section 2 plaintiffs an obligation to prove that the challenged practice was adopted or maintained with the intent to discriminate against minority voters. *Thornburg v. Gingles*, 478 U.S. 30, 43-44, 106 S.Ct. 2752, 2762-63, 92 L.Ed.2d 25 (1986).

In *Gingles*, the Supreme Court identified three "preconditions" to a successful challenge to multimember districts under Section 2: (1) the minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district; (2) it must be politically cohesive; and (3) the white majority must vote sufficiently as a bloc to enable it, in the absence of special circumstances, to defeat the minority's preferred candidate. 478 U.S. at 50-51, 106 S.Ct. at 2766-67. "Regarding the third prong, *Gingles* instructed that 'in general, a white bloc vote that normally will defeat the combined strength of minority support plus white "crossover" votes rises to the level of legally significant white bloc voting.' " *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1007 (2d Cir.1995) (quoting *Gingles*, 478 U.S. at 56, 106 S.Ct. at 2769).

The satisfaction of these three preconditions, which have come to be known as the "*Gingles* factors," is necessary but not sufficient to prove a Section 2 violation. More is required; if the preconditions are met, a district court must then consider whether, under the totality of the circumstances, the challenged practice impairs the ability of the minority voters to participate equally in the political process. *City of Niagara Falls*, 65 F.3d at 1007

(citing *Gingles*, 478 U.S. at 80, 106 S.Ct. at 2781-82). Thus, proof of the *Gingles* preconditions does not always portend liability under Section 2, *Johnson v. De Grandy*, 512 U.S. 997, 1012 n. 10, 114 S.Ct. 2647, 2657 n. 10, 129 L.Ed.2d 775 (1994), but "it will only be the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of circumstances." *City of Niagara Falls*, 65 F.3d at 1019 n. 21 (citing *Jenkins v. Red Clay Consolidated School Dist. Bd. of Educ.*, 4 F.3d 1103, 1135 (3d Cir.1993), *cert. denied*, 512 U.S. 1252, 114 S.Ct. 2779, 129 L.Ed.2d 891 (1994)); *Teague v. Attala County*, 92 F.3d 283, 293 (5th Cir.1996); *Clark v. Calhoun County*, 21 F.3d 92, 97 (5th Cir.1994); *see also Johnson v. De Grandy*, 512 U.S. at 1012 n. 10, 114 S.Ct. at 2657 n. 10 (noting that § 2 challenges to multimember districts are likely to be easier plaintiffs' cases than challenges to electoral practices in single-member districts).

In assessing the totality of the circumstances in which a challenged electoral practice is employed, a district judge must conduct a "searching practical evaluation of the 'past and present reality.' " *Gingles*, 478 U.S. at 45, 106 S.Ct. at 2764 (quoting S.Rep. No. 417, 97th Cong., 2d Sess. (1982) ("Senate Report") at 30, *reprinted in* 1982 U.S.Code Cong. & Admin.News ("U.S.C.C.A.N.") 177, at 208). This requires a fact-intensive, functional view of the political process, in an effort to determine whether the Town's political processes are equally open to participation by its black citizens. *Id.* at 45-46, 106 S.Ct. at 2763-64.

Gingles identified as relevant to this inquiry the factors set forth in the Senate Report (which accompanied the 1982 amendments to Section 2), which are as follows:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction;

8. whether there is significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and

9. whether the policy underlying the state or political subdivision's use of the challenged voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

See Senate Report at 28-29, 1982 U.S.C.C.A.N. 206-07, *cited in Gingles*, 478 U.S. at 36-37, 44-45, 106 S.Ct. at 2758-59, 2762-64; *see also City of Niagara Falls*, 65 F.3d at 1007-08.

The factors set forth in the Senate Report are not exclusive,[2] and are not to be applied mechanically. A failure by plaintiffs to establish a particular factor "is not rebuttal evidence of non-dilution." Senate Report at 29 n. 118, 1982 U.S.C.C.A.N. at 207. Nor should the outcomes of these factors be tallied, as though a majority of them, or particular ones among them, must weigh in plaintiffs' favor before a Section 2 violation is established. *Id.* Rather, these factors are simply guideposts in a broad-based inquiry in which district judges are expected to roll

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[2] Another factor relevant to this broad-based inquiry is the extent to which minority-preferred candidates have been rejected by white voters for reasons other than those which made the candidate the preferred choice of the minority group. In this case, for example, defendants claim that partisan politics, not racial considerations, accounts for the political famine plaintiffs seek to remedy. *See* Part *III, infra*.

up their sleeves and examine all aspects of the past and present political environment in which the challenged electoral practice is used, "because 'ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts.' " *City of Niagara Falls*, 65 F.3d at 1008 (quoting *De Grandy*, 512 U.S. at 1011, 114 S.Ct. at 2657).

II. FINDINGS OF FACT

A. *The Town Of Hempstead And Its Characteristics*

The Town of Hempstead is the most populous town in the United States. Measured by population, it is larger than all but 13 cities in the United States, and is larger than six states. It is 25% larger than New York's third and fourth congressional districts, which both include substantial portions of the Town as well as surrounding areas. The Town is apparently among the largest undivided election districts in the country. According to the United States Census, the total population in the Town is 725,639 (as of 1990), of which 12.1% are black and 83% are white. The voting age population is 11.2% black and 84.8% white. Of this voting age population, 48.6% are registered Republicans, 29.6% are registered Democrats, and 21.8% are either unregistered or are registered as something other than Republican or Democrat.

Since 1960, the black population has grown steadily from 3.4% of the total population to 5.8% (1970) to 9.3% (1980) to the 1990 level of 12.1%. As of 1990, the black population in the Town was 87,644, and there is ample reason to conclude that it has continued to grow as a

percentage of the total population during the past seven years.

The Town of Hempstead is located in Nassau County. The Town includes twenty-two villages and thirty-four unincorporated areas. The county, the Town, and the villages each have their own local governments. The responsibilities of these governments are in some respects distinct. Who fixes a damaged road, for example, depends on whether it is a state road, a county road, a town road or a village road. In other respects, the responsibilities of these levels of government overlap.

The Town is governed by a Town Board, a legislative body that is required under New York Town Law to have a Supervisor and at least four Town Councilmembers. The number of Council seats may be increased to six by a referendum vote of the Town residents. Prior to 1967, the Town Board consisted of a Supervisor, a Presiding Supervisor and four Town Councilmembers. In 1967, the number of Councilmembers was increased by referendum to six. Since that time, the six Councilmembers have been elected in staggered four-year terms. Every two years, in the odd-numbered years, three Councilmembers are elected at-large. Each eligible voter in the Town is able to cast three votes, one for each vacant seat on the Board. "Single-shot" voting (voting for only one candidate) is permitted, and cumulative voting (casting multiple votes for one candidate) is prohibited. The three candidates who obtain the most votes win the three seats on the Board; there is no requirement that a candidate receive a majority vote to win a seat. This system is used in every town on Long Island and in all but approximately ten of the 900 towns in New York State. A referendum to change

the electoral system in the Town of Hempstead from an at-large to a councilmanic district system was rejected in 1967 by the Town residents.

From 1967 until January 1996, the Town Board also included a Supervisor and a Presiding Supervisor, both of whom sat on the six-member Nassau County Board of Supervisors. After a successful challenge to the constitutionality of that body, *see Jackson v. Board of Supervisors*, 818 F.Supp. 509 (E.D.N.Y.1993), and as a result of a county-wide vote and state legislation, the Board of Supervisors was replaced with a nineteen-member county legislature in 1994. The Presiding Supervisor position was eliminated in 1996. Thus, the Town Board now consists of six Councilmembers, who are part-time Town employees earning $45,000 per year, and the Town Supervisor, a full-time employee who is the chief executive and administrative officer of the Town and a voting member of the Town Board.[3]

Throughout the trial of this case, defendants have asserted that the Town Board has only a limited governmental function. They correctly point out that Town residents are affected by a complex web of governments – state, county, town and village. Nonetheless, the evidence establishes that the Town Board exercises substantial authority, both formally and informally, in a wide variety of areas of importance to its residents.

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[3] Although the Town Supervisor is also elected at-large, that practice is not challenged here. *See Butts v. City of New York*, 779 F.2d 141 (2d Cir.1985), *cert. denied*, 478 U.S. 1021, 106 S.Ct. 3335, 92 L.Ed.2d 740 (1986) (Section 2 does not apply to single-member offices).

The formal powers and responsibilities of the Town Board include controlling Town finances, acquiring and selling real property, maintaining Town property (including its various parks), filling vacancies in Town offices, removing fire and health hazards, awarding and executing Town contracts, cleaning and repairing Town streets and roads, maintaining adequate lighting on Town roads, collecting garbage in certain areas of the Town,[4] and promulgating zoning laws and hearing applications for rezoning areas of the Town. The Town has numerous departments, including the Public Safety Department, the Department of Sanitation, the Department of Water, the Department of Parks and Recreation, the Department of Senior Enrichment, the Department of Planning and Economic Development, the Department of General Services, the Department of Highways, the Department of Industry and Commerce, the Department of Conservation and Waterways, the Department of Occupational Resources, and the Department of Buildings. The Board appoints the members of the Board of Zoning Appeals, and hears appeals from its denials of zoning variances. The current Town budget is $290 million, and there are approximately 2500 Town employees.

The formal authority of the Town Board is supplemented by the political influence its members wield. For

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[4] Responsibility for garbage removal is divided among (a) the Town Board, which through its Department of Sanitation handles the eastern part of the Town; (b) five special sanitation districts established by the New York State legislature to collect garbage in unincorporated areas in the western part; and (c) sanitation districts established by some of the incorporated villages.

example, there is no Town Police Department (the Public Safety Department's 60 "safety officers" are not peace officers), but a Councilmember need only pick up the telephone in order to influence the actions of the Nassau County Police Department. Similarly, the Town Board has the power to pass resolutions that can influence other governing bodies. In these and other ways, Town Councilmembers exercise considerable influence over the operations of the other governmental entities that affect the Town's residents.

The main political parties in the Town are the Republican Party and the Democratic Party. Other political parties that have fielded candidates include the Conservative Party, the Liberal Party and the Right to Life Party.

The Republican Party has had a lock on Town-wide elections since the inception of Town government. Indeed, since 1907, the victor of every Town-wide election (Presiding Supervisor, Supervisor, Councilmember, and Town Clerk) – 71 elected officials in all – has been a Republican. With the exception of Curtis Fisher, who was elected in 1993, all have been white.

B. *The First Gingles Precondition: A Sufficiently Large And Geographically Compact Minority Group*

Dr. Andrew Beveridge, an expert in the field of districting, created a map establishing six single-member districts in the Town. He followed four principles in creating the six districts depicted in Plaintiffs' Exhibit ("PX") 4D, which is appended to this decision at A-1: (1) each district should have as close to an equal number of residents as possible, with a maximum variance of 5%; (2)

the boundaries of each district should conform, to the extent possible, to the existing political geography; (3) the districts should be reasonably compact; and (4) to the extent possible, where the first three criteria have been met, the black population should be included in one district. Dr. Beveridge thereby proposed a hypothetical black-majority district without subordinating traditional districting principles to race.

For Census purposes, areas within the Town are designated either villages, Census Designated Places ("CDPs") or unincorporated areas. A CDP is an unincorporated area that is considered a community. There are approximately 10,000 Census blocks and 747 block groups in the Town, from which Dr. Beveridge was able to measure racial composition and draw the six proposed districts, each of which has close to 120,000 people. The largest district is only 1.67% over 120,000, and the smallest, District 3, was only 2.53% less than 120,000.

District 3 is a majority-minority district. Its boundaries follow village and CDP boundaries except in two places: it cuts through the village of Freeport and through the West Hempstead CDP. Where it cuts through Freeport, it crosses south of Sunrise Highway and takes in additional areas with minority residents.[5] The proposed District 3 is very similar to Assembly District 18 – a

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[5] The only other area in the Town that is split between Dr. Beveridge's proposed districts is the North Bellmore CDP, which is split between Districts 5 and 6. District 2 contains only part of two villages, Floral Park and New Hyde Park, but that is because those villages' borders extend beyond the borders of the Town itself.

majority-minority district for election of a member of the New York State Assembly. A comparison of District 3 and Assembly District 18 is depicted in Plaintiffs' Exhibit 4F, a copy of which is appended at A-2. District 3 includes all four of the predominantly black communities in the Town: Lakeview, Roosevelt, Freeport and Hempstead. The total population of District 3 is 55.45% black; the voting age population is 52.57% black. The proportions of blacks and whites in District 3 are within tenths of a percentage point of their proportions in Assembly District 18.

There are some communities that Dr. Beveridge split in his proposed map that might naturally be expected to be included in the same district. For example, Hewlitt, one of the five areas that make up a community known as the "Five Towns" (the other four are Inwood, Lawrence, Cedarhurst, and Woodmere) is not in the same proposed district as the other four. Also, Lido Beach is closest to District 4 but is included in District 6. Dr. Beveridge also split what is known as the "tri-community" of Malverne, Lakeview, and Lynbrook, including only Lakeview in District 3.

Nonetheless, the proposed districts are compact. Dr. Beveridge measured compactness by dispersion in the district, which is calculated by the ratio of the area of the actual district to the area of the ideal district, where the ideal district is a circle the radius of which is the line from the center of the district to the farthest point in the actual district. The most compact district would thus have a dispersion measurement of one. The average compactness for the districts Dr. Beveridge created was .44, and the compactness for proposed District 3 was .38.

District 3 was thus more dispersed than the average dispersion of all six districts. However, in 1990 the average compactness for United States Congressional districts was .36, and the average compactness for New York Congressional districts was .30. Moreover, the compactness for New York State Assembly District 18 (the majority-minority district) is .29.

Dr. Beveridge also measured the compactness of his proposed districts by dividing the perimeter of the ideal district by the perimeter of the actual district. Again, the perfectly compact district has a perimeter ratio of one. Proposed District 3 has a perimeter ratio of .27, which compares favorably with the average perimeter ratios of the majority-minority Assembly District 18 (.26) and the U.S. Congressional districts as measured in 1990 (.24), and it exceeds the 1990 average perimeter ratio of New York Congressional districts (.20).

The compactness of District 3 is further demonstrated the old-fashioned way – by looking at a map. The black population in the Town is clearly confined, in large measure, to a geographic block in its center. Plaintiff's Exhibit 4D, appended at A-1, depicts this visually. In fact, the black population is even more compact than the map suggests, as the northern end of District 3, though shaded in its entirety, includes Eisenhower Park, in which very few people reside.

C. *The Second Gingles Precondition: Political Cohesion Of The Minority Group*

There is no dispute that the black voters in the Town are politically cohesive. Although defendants have challenged the ability of plaintiffs' proposed District 3 to perform by electing a minority-preferred candidate, they agree that the black voters consistently vote cohesively for the Democratic candidates, who always lose the Town Board elections.

Plaintiffs' expert, Dr. Michael D. McDonald, conducted a "performance analysis" to determine whether, given turnout rates and the degree of racially polarized voting, one could reasonably expect that a candidate preferred by black voters could win in a single-member district system. Dr. McDonald concluded that based on the level of black support for the minority-preferred candidate, estimated using a double regression analysis[6] of the election districts in the 18th Assembly District ("A.D."), blacks would have been able to elect their preferred candidate had they been voting in a single-member district with a voting age population that was 47.8% black in the 1991 Town Council election, 44.6% black in the 1993 Town Council regular election, and 34.2% black in the 1993 Town Council special election.

It can be expected, and I find, that blacks in proposed District 3 would be able to elect their preferred candidate.

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[6] The statistical methods used to predict support for candidates by voters of different races are explained in subsequent sections.

D. *The Third Gingles Precondition: White Bloc Voting*

Both plaintiffs and defendants presented expert testimony at trial regarding the voting patterns among blacks and whites in the Town. Plaintiffs expert, Dr. McDonald, analyzed Town Board elections from 1983 to 1993.[7] The first stage of his analysis was a comparison of the percentages of the vote each candidate received in the Town-wide election with the percentages received from voters residing in the 18th A.D., the majority-black district for election to the New York State Assembly. From this analysis, Dr. McDonald drew the preliminary conclusion that the black-preferred candidates would have fared better than they did in the Town-wide elections if the Town Council elections had been held in a majority-black district. Indeed, in the regular elections in 1991 and 1993 and in the special election in 1993, all but one of the seven

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[7] Dr. McDonald also analyzed elections other than Town Board elections to determine whether there was a pattern of racially polarized voting. He analyzed two other town-wide elections involving black candidates (the 1985 Town Clerk election and the 1993 Town Receiver of Taxes election). He also analyzed five elections (from 1984 to 1992) in the 18th Assembly District and four judicial elections involving black candidates: three for the state District Court (in 1990, 1991, and 1993) and one for the state Supreme Court (in 1992). Finally, Dr. McDonald analyzed four primary elections – the 1984 and 1988 Democratic presidential primaries, the 1992 Democratic primary for the United States Senate, and the 1992 Republican primary for the 18th Assembly District. He found that these elections exhibited racial polarization. However, because his findings of racial polarization in the Town Council elections are sufficiently supported and are essentially undisputed by the defendants, these additional elections are not discussed in depth.

winning candidates would have been different had the election been held within the 18th A.D.[8]

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[8] Dr. McDonald found the following results:

1991 Town Council (3 candidates elected) *

Candidate	*Town-wide Vote*	*18th A.D. Vote*
Cairo (R,W)	48.9%	36.6%
Cullin (R,W)	48.0%	39.0%
Zagarino (R,W)	47.7%	36.2%
Kalastein (D,W)	35.9%	39.8%
Grabinger (D,W)	35.2%	38.8%
Ford (D,B)	**34.3%**	**43.2%**

1993 Town Council (3 candidates elected)

Candidate	*Town-wide Vote*	*18th A.D. Vote*
Fisher (R,B)	49.0%	38.7%
Kearney (R,W)	48.3%	32.8%
Santino (R,W)	48.2%	32.2%
Davidson (D,W)	33.5%	41.9%
DeJong (D,W)	33.1%	42.2%
Dorsky (D,W)	32.9%	41.5%

1993 Town Council Special Election (1 candidate elected)

Candidate	*Town-wide Vote*	*18th A.D. Vote*
Blakeman (R,W)	59.4%	41.6%
DeFreitas (D,B)	**39.4%**	**57.2%**

* Only the votes for the top six candidates are reported here. The remaining candidates received less than 5 of the votes cast.

** The first letter following each candidate's name denotes his or her party affiliation; the second denotes race. The black candidates' names and results are in bold type.

However, this analysis is not alone sufficient to determine whether there is a pattern of racially polarized voting in the Town of Hempstead, because it does not measure the degree of difference in support for certain candidates among whites and blacks.

Dr. McDonald thus conducted a further analysis to estimate these levels of support for each candidate. He used methods of statistical analysis called "ecological correlation and regression analysis" (or "ecological regression") and "extreme case analysis." Both methodologies are designed to measure the strength of the relationship between changes in two variables. Ecological regression and extreme case analysis are standard techniques used to estimate voting behavior among distinct population groups. *Gingles*, 478 U.S. at 52-53, 106 S.Ct. at 2767-68.

Extreme case analysis predicts the percentage of voter support for certain candidates among the racial groups by using the support given to the candidates in geographic areas where the voting population is racially homogeneous, which was defined in this case as more than 90% white or more than 90% black. Ecological regression analysis correlates the percentage of voters who voted for a particular candidate with the percentage of blacks in the voting age population in a particular geographic area.

Because both extreme case analysis and ecological regression analysis provide only estimates and are subject to error, Dr. McDonald performed both among voters of various areas to determine whether they produced consistent estimates of the racial groups' support for each

candidate. Dr. McDonald performed four analyses to measure white voting: (1) an extreme case analysis of the seven A.D.s (or parts thereof) within the Town that are over 90% white;[9] (2) an extreme case analysis of the eight election districts within the 18th A.D. that are over 90% white; (3) a simple regression analysis using results from all election districts within the 18th A.D.; and (4) a double regression analysis using results from all election districts within the 18th A.D. To measure black voting, Dr. McDonald did three analyses: (1) an extreme case analysis of the seven election districts within the 18th A.D. that are over 90% black; (2) a simple regression analysis using the results from all election districts within the 18th A.D.; and (3) a double regression analysis using results from all election districts within the 18th A.D.

In his ecological regression analysis, Dr. McDonald measured the relationship between the racial composition of the Town's A.D.s and election districts and the level of support given to particular candidates within those units in elections from 1983 to 1993. He placed the independent variable (the percentage of black or white registered voters in an election district within the 18th A.D.) on the horizontal axis. Dr. McDonald then placed the dependent variable (the percentage of voters in a particular A.D. who voted for a particular candidate) on the vertical axis. He then plotted data points on the graph that represented

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[9] The Town includes all or part of eight Assembly Districts, seven of which are extreme case white (none have more than 7% black voting age population). The eighth is of course the 18th A.D., which has just over 50% black voting age population. There are no extreme case black Assembly Districts.

the percentage of black or white voters in each A.D. who supported a particular candidate. Finally, Dr. McDonald drew a line through the data points which best fit the points on the graph, or the line from which there would be the least variance from each data point. The slope of this line represents the increase (or decrease) in support for a particular candidate when the racial composition of a geographic area changes. By extending the line through the vertical axes on the left and right of the graph, Dr. McDonald estimated the level of white and black voter support for a particular candidate.

Dr. McDonald's ecological regression analysis consisted of both a simple regression and a double regression. The simple regression measured the percentage of white and black voters of the total voting age population who supported a particular candidate. The double regression measured the percentage of support among voters who actually voted. Both analyses of white and black voter support for certain candidates were based on the support in each election district within the 18th A.D. However, Dr. McDonald chose to use the double regression results since they were a more accurate measurement of voter support in each race.

Dr. McDonald computed these figures by considering the percentage of voters in each election district within the 18th A.D. who voted for a candidate and the percentage of voters in each election district who did not vote for that candidate. He then added these figures to determine the percentage of voters in each election district who actually voted in that election. With these figures, he was able to estimate the support for particular candidates in each election district from the voters who actually voted

in that election, rather than the support for each candidate as a percentage of the total voting age population in the election district. Thus, this method took account of any differences in the turnout rate between blacks and whites.

Dr. McDonald was then able to compare the white voter support with the black voter support. He made the following findings:[10]

1983 Town Council (3 candidates elected)[11]

Candidate	*Whites*	*Blacks*
Mondello (R,W)	60.6%	25.1%
Peterson (R,W)	60.0%	26.1%
Cairo (R,W)	59.6%	22.8%
Bernstein (D,W)	28.2%	52.8%
Lawrence (D,B)	**26.5%**	**53.2%**
Reddan (D,W)	25.7%	49.5%

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[10] The findings listed here for white voter support are based on the extreme case analysis of the white A.D.s; the black voter support is based on the double regression analysis of the election districts in the 18th A.D. The other analyses performed by Dr. McDonald to estimate voter support among the different racial groups provided consistent results. Again, the letters following the candidates' names denote their party affiliation and race; black candidates' names are in bold type.

[11] Only the election results from the top six candidates are reported. The remaining candidates received less than 5% of the votes cast.

1985 Town Council (3 candidates elected)

Candidate	*Whites*	*Blacks*
Gaurdino (R,W)	60.0%	29.1%
Bernstein (R,W)	58.7%	28.9%
Weisbein (R,W)	57.9%	26.0%
Lawrence (D,B)	**26.4%**	**44.9%**
Magaliff (D,W)	25.8%	43.3%
Guise (D,W)	25.6%	43.3%

1987 Town Council (3 candidates elected)

Candidate	*Whites*	*Blacks*
Cairo (R,W)	61.7%	27.3%
Zagarino (R,W)	61.0%	23.4%
Cullin (R,W)	59.6%	26.1%
Davidson (D,W)	25.3%	45.4%
Brewington (D,B)	**24.0%**	**57.8%**
DelMastro (D,W)	24.7%	43.0%

1989 Town Council (3 candidates elected)

Candidate	*Whites*	*Blacks*
Levy (R,W)	54.4%	25.3%
Guardino (R,W)	53.5%	25.2%
Kearney (R,W)	53.0%	23.3%
DelMastro (D,W)	33.1%	49.5%
Labelson (D,W)	32.2%	50.4%
Mosely (D,B)	**32.0%**	**53.9%**

1991 Town Council (3 candidates elected)

Candidate	*Whites*	*Blacks*
Cairo (R,W)	50.6%	15.3%
Cullin (R,W)	49.2%	17.3%
Zagarino (R,W)	49.3%	15.0%
Kalastein (D,W)	35.4%	49.5%
Grabinger (D,W)	34.7%	51.5%
Ford (D,B)	**33.3%**	**58.4%**

1993 Town Council (3 candidates elected)

Candidate	*Whites*	*Blacks*
Fisher (R,B)	**50.1%**	**28.6%**
Kearney (R,W)	50.1%	15.4%
Santino (R,W)	50.0%	14.6%
Davidson (D,W)	32.5%	51.3%
DeJong (D,W)	32.1%	52.4%
Dorsky (D,W)	32.0%	51.2%

1993 Town Council Special Election (1 candidate elected)

Candidate	*Whites*	*Blacks*
Blakeman (R,W)	61.3%	20.8%
DeFreitas (D,B)	**37.6%**	**78.4%**

Dr. McDonald concluded that each of these Town Board elections exhibited racially polarized voting. Indeed, all forms of analysis of the voting patterns consistently reveal a clear pattern of racially polarized voting. As a result, Dr. McDonald concluded, black voters have never been able to elect their preferred candidate to the

office of Town Board Councilmember. Dr. McDonald further observed that:

> One cannot help but notice, of course, that the racial polarization apparent in these elections is associated with a form of partisan polarization. Black voters behave in a way indicating their preferred candidates are Democrats. In the face of the white majority's support for Republicans, black voters do not have much, if any, opportunity to elect candidates of their choice.

Defendants' expert, Dr. Harold W. Stanley, also analyzed Town Board elections from 1983 to 1993. In addition, Dr. Stanley analyzed the Town Supervisor and Presiding Supervisor elections from the same years. Like Dr. McDonald, Dr. Stanley used extreme case analysis and ecological regression analysis to determine the levels of white and black support for each candidate. However, Dr. Stanley used all of the election districts within the Town, rather than simply those within the 18th A.D., to conduct his analyses. As a result, he was able to use over 500 data points in his regression analysis, rather than just the 74 upon which Dr. McDonald relied. For his extreme case analysis, Dr. Stanley was able to use 9 extreme case black election districts and 342 extreme case white election districts.

Dr. Stanley found racial polarization similar to that found by Dr. McDonald in the Town Council races. While the racial polarization Dr. Stanley found was slightly less in some instances than that found by Dr. McDonald, the differences are not meaningful. Both sides agree that blacks and whites vote differently. Blacks support Democratic candidates. Whites support Republican candidates.

Democratic candidates, whether white or black, have received similar levels of support from black voters.

Defendants have not seriously contested the existence of racial polarization in the voting patterns in the Town. Indeed, they argue that most elections are racially polarized, including every Presidential election since 1948 (with the exception of 1964). However, they contend that the racial polarization lacks legal significance because partisan politics, not racial bias, best explains the divergent voting patterns.[12]

E. *The Senate Report Factors*

1. *History Of Official Discrimination*

There has been no official policy of discrimination against blacks in the state or in the Town. Nor is there any basis to conclude that the Town's initial adoption of its at-large system, or its residents' 1967 decision to retain it, were motivated by racial animus. Plaintiffs contend, however, that the past use of a literacy test and a purging provision of the New York Election Law had a discriminatory impact on the ability of blacks to register to vote, remain registered to vote, and otherwise participate in the political process.

From 1922 to 1969, a literacy test was used in Nassau County. In order to register to vote, a citizen was required to present a certificate of literacy issued by the New York State Education Department. Plaintiffs contend that the retention of this test for four years after the enactment of

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[12] See Part III, infra.

the Voting Rights Act, coupled with the evidence that blacks in the Town are more likely than whites to be undereducated, constitutes historical discrimination cognizable under Section 2.

In fact, recent data suggest that blacks in the Town are significantly overrepresented at the low end of the education spectrum, and that a literacy test would almost certainly constitute a greater impediment to black voter registration than to white voter registration. Although defendants challenge the assertion that the same would be true in 1969, and correctly point out the absence in this case of socio-economic data from that period, I find the inference that the literacy test had a discriminatory impact on blacks to be a fair one. On the other hand, this adverse impact is blunted by the fact that blacks constituted a considerably smaller percentage of the Town population in 1969 – less than 6%.

The purging of voters from the voting rolls of Nassau County was more recent and is more significant. Section 5-406 of the New York Election Law, enacted in 1949, required the purging of voters who had failed to vote for four successive years. Plaintiffs have demonstrated, through expert testimony based on both ecological regression and extreme case analysis, that the statute produced very substantial differences in the rates at which black and white voters were subject to this "non-voting purging." The purge rate was 56% greater in predominantly minority election districts than in predominantly white election districts. A black registrant in the 18th A.D. had a 70% greater chance of being purged for non-voting than did a randomly selected registrant from one of the remaining Assembly Districts in the Town. The

number of purged voters was substantial; according to Allan J. Lichtman, whose affidavit was received in evidence by agreement, 25,786 voters in the Town were purged.

Defendants have not contested these facts, but instead have emphasized that the purge was conducted pursuant to state, rather than Town, legislation. They further contend that in 1990, when a judge in this district temporarily restrained the implementation of the purge provision because of its disparate impact on blacks, the Town Board voted to consent to further injunctive relief, and the purging ceased. Although I agree that these facts preclude a finding that the purging evidences discriminatory intent on the part of the Town Board, the undisputed discriminatory impact of the purging on black voters in the Town is an appropriate consideration in evaluating the totality of the circumstances.

Finally, plaintiffs offered testimony that blacks encountered racial hostility at the polls in the Town. Hazel N. Dukes, President of the New York State Conference of the NAACP and a member of its national board of directors, testified to her personal observations at two polling places in the Town. Although I credit the testimony of Ms. Dukes, it did not in my view describe unfair or discriminatory treatment of black voters. In essence, Ms. Dukes found that the Republican inspectors at two polling places (each polling place had an inspector from each major party) were insufficiently helpful to apparently unregistered voters (e.g., they failed to advise them of challenge ballots or potential court challenges) and more "aggressive" than Ms. Dukes felt was appropriate. This was not discrimination, invidious or otherwise.

2. *The Degree Of Racially Polarized Voting*

From 1983 to 1993, the successful candidates in every Town Board election consistently garnered between 15% and 29% of the black vote and between 49% and 62% of the white vote. The difference between black and white voter support for the victorious candidate was consistently over 20 percentage points and in most cases over 30 percentage points. In addition, in every election for Town Councilmember, the majority of white voters withheld their support for the minority-preferred candidate. While other cases have involved a greater disparity between the white vote and the black vote, *see, e.g., City of Niagara Falls*, 65 F.3d 1002 (2d Cir.1995) (where frequently less than 10% of whites voted for a candidate supported by substantial majorities of black voters), there is nonetheless a persistent and significant degree of racial polarization in Town Board elections.

3. *Electoral Mechanisms That Enhance Vote Dilution*

While there is no "anti-single shot" rule or majority vote requirement in the Town Board elections, the district is unusually large and there is a prohibition on cumulative voting. These circumstances, and particularly the extraordinary size of the district, significantly reduce the chances of a minority-preferred candidate being elected. As noted, the Town's three-quarters of a million residents apparently make it one of the largest undivided districts in the country. Campaigning is far more difficult than it would be under a single-member districting system. There are upwards of 50 communities in the Town, and

the issues of importance to people in those communities vary widely in different parts of the Town. A successful campaign requires the resources to be able to visit, distribute literature to, and address the issues in all areas of the Town. This requires a level of financing that a candidate for Town Board is not likely to achieve. Black Republicans and Democrats alike testified to the difficulties in running in the at-large system due to the sheer size of the jurisdiction. The difficulties faced by the black candidates in these Town-wide elections contrast sharply with their enhanced ability to campaign effectively in smaller districts, such as the 18th A.D. and the new Nassau County legislative districts.

4. *Access To Candidate Slating Process*

The Republican Party has had unblemished success in electing its candidates to the Town Board. For nearly a century, every Town Councilmember has been a Republican. The Republican Party endorsement is essential to winning an election in the present at-large system. Indeed, there is a well-founded and widely-held belief that, as defendant Councilmember Curtis Fisher put it, "the Republicans seem to control everything in Nassau County." In testimony I credit, witnesses testified that the Republican Party is so powerful that registration in it is a virtual prerequisite to obtaining public employment at any level – from a laborer with the Town, to a school principal, to a Nassau County police officer.

There are no impediments to blacks joining the Republican or Democratic Parties in the Town, and blacks are not prevented from registering to vote or exercising

their right to vote in the Town. Moreover, both the Democratic and Republican clubs in the Town are multi-racial organizations and welcome membership and participation by interested blacks. There are Republican clubs in all of the communities in the Town. These clubs are generally the social arm of the party, and are the gathering points for active party members. The lowest-level governing body of the party is the committee. Each community has one, and it consists of two committee members from each election district. For example, the East Meadow committee has 52 seats, 2 for each of the 26 election districts in East Meadow. Each of those committees elects an executive leader. There are 69 executive leaders in Nassau County, three of whom are black. These 69 executive leaders, together with approximately 20 vice-chairs of the Nassau County Republican Party, meet from time to time with Joseph Mondello, who has been the county chairman for 13 years. Those meetings are called executive committee meetings.

There is a formal procedure for selecting Republican candidates for the Town Board and other elective offices in the Town and the County of Nassau. The county chair will recommend a candidate to the executive committee, which votes on whether to recommend that person to the party's convention, which consists of all of the approximately 2,000 committee members in the county. The convention then votes on the recommendation. The voting system is weighted in accordance with each area's performance in the previous election.

In practice, the slating process is more simple. The executive committee never rejects or even debates the merits of the county chairman's recommendations. It

always and unanimously recommends Mondello's selections to the convention, which always and unanimously accepts them. The weighted voting system has never been used, and there has never been a Republican primary for a Town-wide office. In short, while the executive leaders, and presumably others as well, may lobby Mondello in support of proposed candidates, as a practical matter, Mondello selects the party's nominees.[13]

In addition to the many Republican clubs in the villages and unincorporated areas, there is a prominent black Republican organization, the Nassau County African-American Republican Coalition ("A.A.R.C."), which includes various black political leaders (some of whom are clergy) in the Town. The purpose of the coalition is to enhance the role of black Republicans in county, town and village governments in Nassau County. The A.A.R.C. has lobbied Mondello to nominate black Republicans for certain elective offices. These have generally been recommendations for candidates to run on the Republican ticket in majority-minority districts, such as the recommendation of Andrew Hardwick to run in the state's 18th Assembly District. Other successful recommendations

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[13] In the Democratic Party, "mini-conventions" are held in the areas that will be represented by the office up for election. Any candidate who does not receive the party's nomination at such a convention is then able, at his or her own expense, to print petitions and gather enough signatures to challenge the nominated candidate in a primary. Primaries resulting from such action have occurred for Democratic Congressional and State Assembly nominations. However, as in the Republican Party, no primary has ever been held for a Town Board nomination.

included Judge Carnell Foskey, who was appointed a District Court Judge.

However, the Town Board and the Republican Party have not been receptive to the idea that a black should occupy what is perceived in the Town as a far more significant office: Councilmember on the Town Board. To the contrary, the Republican Party has failed to produce a black candidate for Town Board, with the sole exception of Curtis Fisher in 1993. That exception does not alter my finding that blacks have been denied access to the Republican Party slating process for Town Board elections.

In 1987, two vacancies arose on the Town Board. Patrick Zagarino and Angie Cullen, who are both white Republicans, were appointed to the vacancies. In 1989, there were two more vacancies on the Town Board. When it became known that two more white Republicans would be appointed to fill them, there was a march on Town Hall by blacks seeking the appointment of a black Republican. The protesters included the leaders of the A.A.R.C. This public display of frustration by the most prominent black Republicans in Nassau County did not derail the appointment to the Town Board of two white Republicans, David Levy and Joseph Kearney. In an apparent effort to placate the A.A.R.C., Mondello appointed Curtis Fisher,[14] a black Republican, to the position of Executive

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[14] Technically, the Town Board, not the party chairman, "appoints" someone to a vacancy or to an executive position in Town Hall. However, as noted above, there is no dispute that Mondello's "recommendations" were always appointed and that he, in substance, placed people on the Town Board. *See, e.g.* Tr. 1204, 1258. Also, at the time, Mondello wore two hats,

Assistant to the Town Board. Fisher lives in the white community of Baldwin Harbor, and had been for many years Mondello's close personal friend and tennis partner.

In 1993, a vacancy arose on the Town Board. When that occurred, the A.A.R.C. recommended Lance Clark, a black attorney who is the Deputy Mayor of the Village of Hempstead. Clark has been a pillar of the black communities of Hempstead and Lakeview. He was active in the NAACP branches in both communities as well as the Hundred Black Men of Nassau, Suffolk, Inc., and Operation Get Ahead, a youth organization. He has been a Republican committeeman in the Village of Hempstead for 14 years. Clark, like many black Republicans, felt that the at-large system deprived the African-American community of representation on the Town Board by a person who lived in that community and had to deal with the day-to-day issues there.

The A.A.R.C.'s recommendation to Mondello that Lance Clark be appointed to the Town Board was rejected. Indeed, Clark was not even interviewed. Instead, without any input from the A.A.R.C., Mondello appointed his close friend Curtis Fisher instead. Fisher had been found less qualified to represent the African-American community than Clark by the A.A.R.C., which had interviewed both before recommending Clark to Mondello.

Presiding Supervisor and Chairman of the Nassau County Republican Party.

The parties have vigorously disputed the relative qualifications of Clark and Fisher to be appointed to the Town Board. The plaintiffs correctly observe that Clark had far more involvement in both the community and the Republican Party than Fisher, and was the more qualified and likely candidate for the Town Board, especially considering the emphasis within the party on "paying dues" through loyal and lengthy public service before ascending to higher office. Defendants counter by citing Fisher's background as a star athlete and experience as an educator, and further point out that there is nothing wrong or unusual about rising in politics by playing tennis with a power broker. Although the plaintiffs have the better of this argument, the issue before me is not whether the Nassau County Republican Party appoints or nominates the best available Republicans, or the most deserving ones, but whether its slating process for Town Board seats is truly open to blacks. Despite the appointment of Curtis Fisher – indeed, in part *because* of it – the events of 1989 and 1993 cause me to conclude that it is not.

I am further persuaded of this by the testimony of the Town's prominent black Republicans regarding their efforts to penetrate the appointment and slating process for Town Board seats. There is no dispute that, as noted above, black Republicans fervently wanted representation on the Town Board, and their frustration at the party's failure to provide it in 1989 had bubbled over to produce the march on Town Hall. It is also clear that the A.A.R.C. had enjoyed success in recommending to Mondello blacks for appointment to or nomination for lesser positions and for offices in majority-minority districts. However, the A.A.R.C. had not, in either 1987 or 1989,

recommended anyone to Mondello for the Town Board. The testimony of prominent black Republicans revealed inconsistent explanations for that. Robert Francis, the Town's Commissioner of Planning and Economic Development, attributed it to the lack of black Republicans interested in the position. Briding Newell, another prominent black Republican who currently works as an analyst with the county legislature, testified that the A.A.R.C. decided in 1993 that its longtime lobbying for a Town Board seat would be stronger if it finally "attached a name to the process."

It is possible to make too much of this conflict, which I attribute to the palpable discomfort these otherwise impressive witnesses exhibited in testifying about their own party's treatment of black Republicans' efforts to obtain representation on the Town Board. They were not alone in this regard. Lance Clark himself – the A.A.R.C.'s choice for Town Board, who was flatly rejected by Mondello – testified unconvincingly that the Nassau County Republican Party is receptive to the recommendations of the A.A.R.C., which Clark described as Mondello's "African-American community advisors."[15] In any event, I conclude that Town Board seats were sufficiently beyond the realm of possibility for black Republicans that they never even attempted to obtain one through the normal

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[15] While the party acceded to A.A.R.C. requests to place black Republicans in a small number of judgeships and commissioner positions in Town government, even Clark believed that Mondello had snubbed the A.A.R.C. by appointing to the Town Board a black Republican who neither lived in the black community nor had "paid his dues" sufficiently to merit town-wide office.

party mechanisms until 1993. And then they were simply shut out. Gregory Peterson, a Republican who is the Town Supervisor, testified that the party sought in 1993 to show that it was open to everyone, to "reach [ ] out to the African-American community."[16] I do not credit this testimony, because the facts show that rather than appoint the person recommended by the party's own black members, a "safe" black Republican was appointed instead.[17]

5. *Discrimination In Other Areas Which Hinders Blacks' Ability To Participate In Political Process*

Plaintiffs presented the expert testimony of Dr. William O'Hare regarding the socioeconomic status of blacks in the Town. Dr. O'Hare obtained data from the U.S. Census Bureau and a variety of academic and professional publications to examine the relationship between the socioeconomic status of blacks in the Town and their participation in the political process.

There is an income differential among blacks and whites in the Town. The median household income of blacks is $45,418, as compared to $53,574 for whites. There is a higher per capita income among whites and a higher unemployment and poverty rate among blacks. With respect to the type of jobs held by blacks and whites, 60% of blacks and 73% of whites were in white-collar jobs.

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[16] Tr. 1437.

[17] *See* pp. 344-346, *infra*.

There is also a disparity in the educational levels attained by blacks and whites in the Town. For example, 17% of blacks have at least a four-year college degree, as compared to 29% of whites; and 76% of blacks have a high school degree, as compared to 85% of whites. Finally, blacks are less likely than whites to own a home, a car, and a telephone, and the homes that are owned by blacks have a lower median value than the homes owned by whites.

These differences notwithstanding, on the whole, blacks in the Town of Hempstead have fared well. The median household income of black families in the Town far exceeds that of (a) blacks in the United States; (b) blacks in New York State; (c) whites in the United States; and (d) whites in New York State. Forty-four percent of the blacks in the Town earn more than $50,000 per year. Home ownership by blacks (62%) in the Town exceeds the national average, as does the median value of owner-occupied homes ($162,800). Indeed, in an unrelated study of the best places for blacks to live, Dr. O'Hare rated the Nassau-Suffolk area, which embraces the Town, first among 48 metropolitan areas in the country.

In sum, as in most metropolitan areas, blacks in the Town have a lower socioeconomic status than whites. As a result, there are mild differences in the abilities of blacks and whites to participate in the political process. For example, it is more difficult for people employed in blue-collar jobs where they are paid by the hour to take time off from work to go to the polls. Also, those with lower incomes obviously have less money to contribute to political campaigns. However, in the Town of Hempstead, these differences in the socioeconomic status of blacks do

not significantly impair their relative ability to participate in the political process.

6. *Racial Appeals In Political Campaigns*

The western part of the Town borders on the New York City borough of Queens. Several of the Queens neighborhoods along that border are predominantly black. Until fairly recently, the Elmont and North Valley Stream CDPs, like the other parts of the Town bordering Queens, were predominantly white. In the past fifteen years, black flight from Queens to the Nassau County suburbs has caused some racial tension in the Town. This tension resulted in some troubling appeals to racism in campaign literature.

In a late 1970s campaign for a State Senate seat from an Assembly District within the Town, the incumbent Republican appealed to the fears of Town residents that black students from Queens would be bused to schools in the Town. The campaign literature used pictures of black children in school buses to convey the message that voting for the Democratic opponent would result in such busing.

In 1987, the racial composition of the communities of Elmont and North Valley Stream was in transition. Although certain neighborhoods in these communities are now predominantly black (*see* A-1), they were then still predominantly white, but were showing the effects of the influx of blacks from Queens. The campaign literature of incumbent Republican Town Councilman Joseph Cairo

sought to appeal to the anti-black sentiments aroused by this migration.

Specifically, Cairo's brochure, under the heading "Preventing Urban Encroachment," stated that he was "well aware of his community's proximity to the City of New York," and the attendant risk of "urbanization." Cairo claimed to be "a major opponent of those who seek to 'Queensify' North Valley Stream and its environs." Under the heading "Crime," Cairo's brochure warned of the possibility of "urban crime spilling over the county border." He claimed to be the "unofficial liaison with the Nassau County Police Department," in which capacity he "sensitized local patrolmen to the special concerns of the community." These statements were contained in a brochure that included seven photographs of Cairo with approximately three dozen members of the Elmont and North Valley Stream communities; none of the photographs included a black person.

There was evidence, which I credit, that the "sensitizing" of the police department resulted in an unofficial border patrol policy: if black youths from Queens ventured across the border, the police were to stop them, find out their business and ensure that they "go back where they belong." Specifically, Melvin Boone, a registered Republican and a detective with the Nassau County Police Department, was a uniformed officer in 1986 in the Fourth Precinct. That precinct included Inwood, which, like Elmont and North Valley Stream, borders Queens and included neighborhoods that were becoming increasingly black. Detective Boone testified that, although there was no explicit directive, the "overwhelming feeling" within the department was that its job was to keep

Queens blacks out of the border neighborhoods, and border patrols were conducted accordingly.

It is true, as defendants contend, that the language in Cairo's campaign brochure is subject to different interpretations. One reading of it is that Cairo would simply work to keep the suburban areas from becoming too commercialized and crime-ridden. The plaintiffs, supported by the testimony of witnesses, argue that a different meaning was intended. For example, if the brochure was truly addressing a crime problem, plaintiffs contend, why does it mention "urban" crime?; if commercialization was the concern, why use "Queensification?" They argue that, in the western part of the Town in the late 1980s, these were thinly-veiled code words for anti-black sentiment.

Although some light could presumably be shed on these issues by Cairo himself, who is a sitting Town Councilman and a defendant in this case, he elected not to testify. I find that in the particular circumstances at that time and in those communities, Cairo's campaign literature was *perceived*, reasonably, as a promise to stem the tide of blacks across the Queens border into Elmont and North Valley Stream. As noted, other evidence supports plaintiffs' claims that the Town Board – perhaps through Cairo himself – used its unofficial influence over the police department to further this goal.

There was testimony, which I credit, that this particular piece of campaign literature in Cairo's 1987 campaign was part of a larger pattern of Republican campaign materials that were characterized by subtle racial appeals,

which sought to depict the integration of white areas as a threat, and to prey on the fear of such a threat.

7. *Minorities Elected To Public Office*

Under the functional view of the political process mandated by Section 2, the most important factors bearing on a challenge to a multimember system are the extent of racial polarization and the extent to which minority group members have been elected to public office in the jurisdiction. *Gingles*, 478 U.S. at 48 n. 15, 106 S.Ct. at 2765 n. 15 (citing Senate Report at 28-29). Between 1907 and 1993, every member of the Town Board was a white Republican. In 1993, Curtis Fisher, a black Republican, was appointed to a vacancy on the Board, and he successfully ran for election later that year. To this day, he is the only nonwhite member in the history of the Town Board.

To be sure, black Republicans have been appointed or elected to other positions in the area. Alfred Robbins, Carnell Foskey and Leonard Clark were elected to Nassau County District Court, and Gerald Carter was appointed to that position. James Garner, Lance Clark, Jacqueline Jackson and Ralph Smith have been elected to governmental positions in the villages of Hempstead and Freeport. In addition, black Republicans have been appointed to policymaking positions in the Town: Robert Francis (Commissioner of Planning and Economic Development); Clinton Boone (Commissioner of Occupational Resources); and Briding Newell (Commissioner of the Department of Drug and Alcohol).

The defendants further rely on the appointment of some black Republicans to other Town and party positions, but the most critical fact in this regard is that until the election of Curtis Fisher in 1993, no African-American was ever elected to the legislative body at issue in this case. As for the election of Fisher, plaintiffs contend that it should be disregarded entirely. The Senate Report acknowledged the risk that "the majority citizens might evade the section[,] e.g., by manipulating the election of a 'safe' minority candidate." Senate Report at 29, n. 115, 1982 U.S.C.C.A.N. at 207. Plaintiffs contend that the appointment of Fisher, followed by his inevitable election to the position, was such a manipulation. For the reasons set forth in the next section, I find this argument persuasive.

8. *Responsiveness By Elected Officials To Minority Needs*

The plaintiffs contend that the Town Board has been unresponsive to various needs of the black communities in the Town. Although their claims are not borne out by the evidence in all respects, there is nevertheless substantial evidence that the Town Board is unresponsive to the particularized needs of the black communities in the Town.

In this regard, evidence of tangible efforts of elected officials to respond to the needs of the minority group is relevant. Senate Report at 29 n. 116, 1982 U.S.C.C.A.N. at 207; *City of Niagara Falls*, 65 F.3d at 1023 n. 24. In *City of Niagara Falls*, for example, the court found relevant that

the defendant city had established a Human Rights Commission, which began an Affirmative Action Task Force to increase minority enlistment in the police and fire departments. The city further established programs to promote the integration of its schools, community policing in black neighborhoods and loans to minority business owners. 65 F.3d at 1023.

This case stands in stark contrast. When Gregory Peterson, the Town Supervisor, was questioned about the fact that no affirmative action resolution had ever been proposed by Curtis Fisher, he explained that none was necessary because "We have an affirmative action policy" and "an affirmative action officer." Fisher himself testified that he was appointed Affirmative Action Officer in 1989, succeeding Carnell Foskey.

However, there was no affirmative action policy at all. The only policy was a prohibition of overt racial animus in Town government, and both Peterson and Fisher consider that affirmative action.[18] The Affirmative Action Officer for the Town received no training, was not familiar with anti-discrimination laws, and was not familiar with standard forms used by the Equal Employment Opportunity Commission. As noted, there was nothing that could accurately be described as affirmative action; the policy was merely an anti-racial slur policy.

Even at that, it was not much of a policy. As Affirmative Action Officer, Fisher sought to solve race discrimination problems informally, "rather than going through a

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[18] *See* Tr. 1449-51; 1889-90.

court case and going through the Human Rights Commission and blowing things all out of proportion." Unfortunately, this produced no apparent solutions at all. For example, Earlwin Warren, like several witnesses in this case, registered as a Republican because he shared the view (which was widely held and often stated in the Town) that doing so was the only way to be successful in the Town. A committee member from Uniondale from 1988 to 1991, he worked actively for the party. Warren was also employed by the Town, in the Department of Sanitation. Upon his return from military service in Operation Desert Storm, he was promoted to labor foreman. Warren was treated badly by other members of the department, both with respect to work assignments and through the use of racial epithets and other verbal abuse in the workplace.

When Warren brought these conditions to the attention of the Town, Fisher investigated in his capacity as Affirmative Action Officer. He concluded that Warren was subjected to racial discrimination in the Department of Sanitation, including being berated as a "nigger" by a Town co-worker in a Town workplace. When asked if the offending employee was disciplined, Fisher first testified that it "depends how you define discipline;" he then admitted that he never bothered to find out whether any action was taken against the offending employee.[19] Fisher made no report or recommendation to the Town Board, and there was never any sensitivity training for the employees in that department. When Warren applied to speak before the Town Board, it did not allow him to

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[19] Tr. 1869-70.

complete his statement to the Board, but rather assigned a staff member to speak with him one-on-one. Indeed, Peterson never even became aware that his Affirmative Action Officer had concluded that Warren had been subjected to race discrimination and called a "nigger" in the workplace by his fellow Town employees.

San Salvadore Bloomfield, an immigrant from Jamaica and a member of the Uniondale Republican Club, worked for the Town as a part-time carpenter. He complained to Fisher, who by that time was a member of the Town Board, that two white carpenters were hired into full-time jobs ahead of him, and that this could only have been the result of discrimination on the basis of race and national origin. Fisher spoke to the Town's Personnel Director, but reported back to Bloomfield that there was nothing Fisher could do. This was true even though Fisher believed Bloomfield should have gotten the job, and recommended to Peterson that it be given to him. Bloomfield subsequently sued the Town. Even after Bloomfield established in that action that he was the subject of unlawful discrimination, and received a judgment against the Town, the Board took no action, and declined to provide any sensitivity training to Town employees in that department.

Although the Town does not directly control the village fire departments, it can influence such entities through the allocation of funds and through the substantial political influence elected officials have in the Town. Thus, the Town Board's inaction upon learning that a trophy on display in the Freeport Volunteer Fire Department bore the inscription of the Ku Klux Klan further demonstrates an insensitivity to the concerns of the

blacks in that predominantly minority community and in the Town as a whole.

There have been other instances of unresponsiveness on the part of Town officials to the needs of the black communities in the Town. For example, residents of the Lakeview community sought funding from the Town for a community center. They were turned down on the ground, stated by Councilman Fisher, that funding the center would "open a whole can of worms," in that it would essentially require the Town Board to fund other communities' similar requests. Although that response seems innocuous on its face, the brunt of this policy fell almost entirely on the black communities; with one exception, the other requests for community center funding were from other black communities: Uniondale, Roosevelt, and the black community in Elmont. Councilman Fisher never even attempted to procure Town funding for these community centers.[20]

Similarly, the commercial center of Roosevelt, which is located on Nassau Road, has fallen upon hard times. A

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[20] Defendants' response to this complaint of insensitivity was somewhat disingenuous. Mr. Fisher initially suggested that Lakeview's request for funding resulted in the Town's assistance in funding a Police Athletic League ("PAL") facility in Roosevelt. However, further examination revealed that (a) the PAL facility did not constitute a substitute for the community center; (b) the Town's assistance to that project was not in response to the community's request for a community center; (c) none of the black communities' requests have been granted; and (d) the Town has evidenced no interest in those communities' efforts to raise the money in other ways.

plan for its redevelopment – which included the construction of a number of residential structures – met with community opposition and became stalled at least as early as 1992. Sorely in need of attention, the problem has languished ever since, and Councilman Fisher, who is held forth by defendants as the point man for problems in the black communities, stated only that he will make a recommendation to the Town Board when he feels comfortable he has a solution that everyone will like.

The black communities are not entirely ignored by the Town Board. It has built housing in Roosevelt, and has expended more than $6.6 million in road construction projects there in the last two years, to cite just two examples. The persistent assertion by plaintiffs that the location of the Echo Park pool, the only indoor pool in the Town, evidences racial discrimination because it is in a white neighborhood is entirely without merit. Also, many services about which complaints have been made are the principal responsibility of other governmental entities, such as villages, the county, or water or sanitation districts. Perhaps most importantly, Robert Francis, a black Republican who now serves as Commissioner of Planning and Economic Development, has worked hard for many years to respond to the concerns of the black communities, including his home community of Roosevelt. In those instances where he has not met with success, it has not been due to insensitivity, lack of diligence or lack of ability.

However, on balance, viewing all of the evidence as a whole, plaintiffs have established a significant lack of responsiveness to the particularized needs of blacks in

the Town. Most significantly, they have established indifference and callousness on the part of the Town Board with respect to the issue that probably matters most to blacks: racial intolerance and bigotry in Town government itself. It is a government that, in all seriousness, regards a prohibition against overt racial animus as affirmative action, and even when such animus is brought to its attention, takes no action at all.

9. *The Tenuousness Of The Policy Underlying At-large Elections*

At-large voting practices are not *per se* violative of Section 2, and plaintiffs are not entitled to relief simply because a councilmanic district system might better serve the blacks in the Town. The Senate Report factors, on the other hand, include an inquiry into whether the policy purportedly advanced by the challenged practice is tenuous. Here, that factor weighs in favor of the plaintiffs.

Gregory Peterson, the Town Supervisor, rendered the following opinion regarding the advantages of the at-large system:

> I believe an at-large system in a middle class suburban township is an appropriate form of government. It doesn't allow for wiggle room. Each councilman has to run in each area of the township, has to be responsible and responsive to each area of the township, has to know the concerns throughout the Town of Hempstead and runs in each and every area.
>
> Most people in – most people in a suburban area have come from open spaces, have come from

> less government, want less government not more government. . . . [21]

The deficiency of a district system, according to Peterson, is that the residents of a particular district would suffer if they have a weak representative on the Town Board. Even if the weakling were a Republican, the failure "to get his or her point across" could result in all the "negative things" happening to that one district. Peterson further testified that if a district were represented by a Democrat – black or white – it would breach the "oneness" of the "suburban mentality, open air mentality, which is the same throughout an entire area," and that district could end up, for example, having all the undesirable public facilities placed within its borders.[22]

I find these purported advantages, elicited by the defendants in support of the status quo, to be tenuous. First, a switch from an at-large system to a councilmanic one does not produce "more government," as Peterson suggests. Plaintiffs do not seek to enlarge the Town Board or its authority. Second, the defendants' claim that the at-large system guards against ineffective representation by a weak councilperson in a district system ignores the fact that such a system would enhance the black communities' ability to vote someone *out* of office, not just into it, which may be a more powerful safeguard against ineffective representation. The evidence has established that members of the black communities in the Town do not have a Town Board member who is accountable to them. Although, as discussed below, the Town Supervisor has

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[21] Tr. 1350.

[22] Tr. 1351-54.

informally created some *de facto* districts, black citizens in the Town justifiably believe that they have no one to turn to on the Board. The Councilmembers, who in most instances ignore the concerns of the black communities, can afford to do so because they can count on receiving sufficient votes from other areas to keep their seats on the Town Board.

I recognize that the "comparative merits of the [single-member versus at-large] approaches to metropolitan representation [have] been much mooted and [are] still in contention," *Whitcomb v. Chavis*, 403 U.S. 124, 154 n. 33, 91 S.Ct. 1858, 1874 n. 33, 29 L.Ed.2d 363 (1971), and that multi-member districts are not *per se* unlawful. However, defendants' reliance on the familiar argument that Councilmembers elected at-large represent everyone is further undermined by what in fact occurs in the Town. Defendants contend that the current system avoids "carv[ing] the town into small little districts, where people fight over provincial issues."[23] However, the evidence reveals that the Town is sufficiently large and unwieldy that the Town Board has created *de facto* districts, assigning principal responsibility for areas in the Town to particular members. For example, before Curtis Fisher was appointed to the Town Board in 1992, Joseph Cairo, who as noted above resides in North Valley Stream, was "in charge" of Lakeview, one of the predominantly black neighborhoods.[24] Fisher, who also does not reside in one of the black communities, was assigned this responsibility by Peterson upon joining the Town Board. These

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[23] Tr. 22.

[24] Tr. 1769, 1858.

and other assignments have been and continue to be made by Peterson "in order to make things work in a more efficient manner[;] it's broken up so that councilmen would oversee certain [geographic] areas."[25] This *de facto* districting supports the plaintiffs' claim that the Town is simply too big and diverse for its governing body to be elected at-large and undermines the defendants' justification for that practice.

Finally, the most tenuous aspect of the Town's defense of the at-large system is Mr. Peterson's contention that it produces better government for the black communities. The argument goes as follows: the Town Board members are currently responsive "to the entire town's needs." When it must locate a recycling plant, for example, it does "the right thing," without reference to politics. If the blacks succeed in imposing single-member districts, and can then elect a candidate of choice, they will elect a Democrat. According to Peterson, then "you wind up with a very parochial attitude," and rather than doing the "right thing," the Republican majority's baser instincts will cause it to dump on the "Democratic zone."[26] Put another way, the defendants contend that the blacks will get better, more benevolent government if they continue never to elect their preferred candidates than if they finally elect a candidate of their choice to represent their communities' specific needs.

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[25] Tr. 1857; *see also* Tr. 640, 1352.

[26] Tr. 1353-54.

Although this contention is troubling in several respects, it is sufficient to observe that it cannot be reconciled with the purpose or terms of Section 2 of the Voting Rights Act.

10. *Political Partisanship*

In addition to analyzing racial polarization in the Town Board elections, defendants' expert, Dr. Stanley, used regression analysis to determine the relationship between voter support and the partisan registration of election districts. He found that higher percentages of blacks supported Democratic candidates than Republican candidates, and higher percentages of whites supported Republican candidates than Democratic candidates. This finding is consistent with Dr. McDonald's findings and with the party registration of black and white voters. Among black voters in Hempstead, 68% are registered Democrats and 22% are registered Republicans. Among white voters in Hempstead, 51% are registered Republicans and 26% are registered Democrats.

To measure the effect of political partisanship, Dr. Stanley compared two regression analyses: one measured the strength of the relationship between the partisan composition of an election district and the level of support for each candidate; the other measured the strength of the relationship between the racial composition of an election district and the level of support for each candidate. He found that in every Town Council election and for every candidate, changes in support for a candidate were greater when the partisan composition of an election district changed than when the racial composition

changed. Therefore, he concluded that the relationship between the partisan composition of an election district and the level of support for a candidate was stronger than the relationship between the racial composition of an election district and the level of support for the same candidate.

Dr. Stanley also found that regardless of the race of the Democratic or Republican candidate, they received similar levels of support in every election. That is, when a black Republican, Curtis Fisher, ran for election in 1993, he received a similar level of support from white voters as did the white Republican candidates. When a black Democrat, Michele DeFreitas, ran for election in 1993, she received a similar level of support from white voters as did the white Democratic candidates. Moreover, Dr. Stanley found that Republican candidates received a greater level of support from Republican voters and Democratic candidates received a greater level of support from Democratic voters, regardless of the race of the candidate.

Dr. Stanley concluded that while there was a pattern of racial polarization, there was a stronger pattern of political partisanship, which had the secondary effect of racial polarization because blacks preferred Democratic candidates and whites preferred Republican candidates.

III. CONCLUSIONS OF LAW

A. *The First Gingles Precondition*

The first precondition plaintiffs must satisfy is that the minority group be sufficiently large and geographically compact to constitute a majority in a hypothetical single-member district. *Thornburg v. Gingles*, 478 U.S. 30,

50, 106 S.Ct. 2752, 2766, 92 L.Ed.2d 25 (1986). If it is not, the multimember form of government cannot be responsible for its inability to elect its candidates of choice, *id.*, and in any event a court could not fashion a remedy for a demonstrated dilution of its voting strength. In short, unless minority voters are sufficiently numerous and compact that they have the potential to elect representatives in a single-member system, they cannot claim that their voting rights have been infringed by a multi-member system. *Gingles*, 478 U.S. at 50, n. 17, 106 S.Ct. at 2766, n. 17.

Here, plaintiffs have proved that blacks in the Town of Hempstead would constitute a majority of the voting age population in one of six single-member districts. The six proposed districts are of almost equal population. Proposed District 3 has a voting age population that is 52.57% black. This percentage of black voters constitutes both a majority and a sufficiently large percentage of voters in that district to give blacks the potential to elect their preferred candidate. *Westwego Citizens for Better Government v. Westwego*, 946 F.2d 1109, 1117 (5th Cir.1991) (proposed district with black voting age majority of 52.8% satisfies the first *Gingles* precondition). Dr. McDonald's performance analysis indicated that, with white crossover voting, blacks would have had to comprise 44.6% of the voting age population in a single-member district in 1993 to enable them to elect their preferred candidate. Since proposed District 3 easily exceeds that percentage, the black population in the Town is sufficiently large to meet the first *Gingles* precondition.

The black population is also sufficiently compact geographically. Indeed, using compactness measurements such as the ratio of the actual area to the ideal area and the ratio of the actual perimeter to the ideal perimeter, the proposed majority-minority district is more compact than the 18th State Assembly district and the average U.S. Congressional district. The proposed majority-minority district virtually overlaps the existing 18th State Assembly District. Moreover, the boundaries of the proposed single-member districts generally follow the existing borders of villages or unincorporated areas. There is only one village that is split between districts (Freeport) and two Census Designated Places that are split (North Bellmore and West Hempstead). While the proposed districts also split two communities – the "Five Towns" and the "tri-Community" – there was no showing that any common interests held by the villages or areas within these communities would be adversely affected.

In any event, the proposed districts are not "cast in stone." *Clark v. Calhoun County, Miss.*, 21 F.3d 92, 95 (5th Cir.1994). They were proposed to demonstrate the feasibility of a single-member district that would be both majority-minority and drawn in accordance with traditional districting principles. The Town itself will have the first opportunity to fashion a remedial plan, and if in doing so it wishes to reunite Hewlett with the rest of the Five Towns (to pick one example), it is free to attempt to do so, and the evidence before me indicates that this adjustment is feasible.

The defendants' other challenges to the proposed District 3 have no merit. They claim that Dr. Beveridge

ignored the local political geography by crossing Hempstead Lake into the village of Rockville Centre to "capture" some blacks, but the evidence establishes beyond doubt that no such encroachment occurred. Rather, the record reveals that the Rockville Centre side of the lake is shaded on Plaintiff's Exhibit 4D only because that reflects the boundary of the census block known as the Lakeview CDP, not because persons living on that side of the lake were included in District 3. Indeed, the evidence demonstrated that no one resides in the shaded area east of the lake.[27]

Proposed District 3 divides the Village of Freeport, and defendants challenge the decision to cross a natural boundary, Sunrise Highway, to include an area south of that thoroughfare in the proposed district. However, while the decision to cross Sunrise Highway is challenged as an effort to "scoop up more black citizens," it was in fact an effort to comply with the one-person, one-vote criterion. Indeed, the portion of District 3 that is south of Sunrise Highway is predominantly white, and its addition actually lowered the percentage of blacks in the district. It is true, as defendants point out, that Dr. Beveridge could have added more people to District 3 by adding part of the adjacent South Hempstead CDP, which is overwhelmingly white. However, it is equally true that he could have added a portion of northeast Baldwin CDP, which is both adjacent to District 3 and predominantly black. I credit the testimony of Dr. Beveridge that crossing Sunrise Highway to include more of the village of Freeport in District 3 was a reasonable judgment that was

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[27] *See* Tr. 203-11, 222, 2090; Def.Ex. 5-E; Pl.Ex. 4-G.

motivated by the one-person, one-vote principle. The remaining objections by the defendants to the proposed districts, including the uncharacteristic hyperbole that one part of proposed District 6 is "across the Atlantic Ocean" from the rest, do not alter my conclusion that the first prong of the *Gingles* test has been satisfied.

Finally, defendants object to blacks, who comprise 12.1% of the electorate, gaining the ability to control (through a single-member district) 16.6% of the six Council seats. To be fair, plaintiffs actually seek approximately 14% of the voting power on the Town Board, taking into account the voting power of the Supervisor. In any event, "[j]ust as the proviso to § 2(b) ensures that white candidates are free to compete for electoral success that exceeds the ratio of white voters, so blacks must be free to compete for favor; the Voting Rights Act neither sets nor tolerates a cap on their achievements." *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 359 (7th Cir.1992), *cert. denied*, 508 U.S. 907, 113 S.Ct. 2334, 124 L.Ed.2d 246 (1993).

In sum, the compactness of the black population in the Town of Hempstead stands in stark contrast to the diffusion of blacks in its neighboring Long Island town, the Town of Babylon. There are multiple possible single-member district schemes in this case that do not require a "convoluted" majority-minority district with "narrow corridors" connecting pockets of minorities "sprawl[ed] across the Town." *Reed v. Town of Babylon*, 914 F.Supp. 843, 872-73 (E.D.N.Y.1996). Rather, plaintiffs have amply demonstrated that a majority-minority district can be fashioned without subordinating traditional districting principles to racial considerations, and have proved that

the black population in Hempstead is sufficiently large and geographically compact to constitute a majority in a single-member district.[28]

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[28] In its evaluation of the *Gingles* criteria, the court in *Reed* applied the same standard of compactness as that required by the Supreme Court in *Miller v. Johnson*, ___ U.S. ___, ___, 115 S.Ct. 2475, 2488, 132 L.Ed.2d 762 (1995). *Reed*, 914 F.Supp. at 871. *Miller* was a constitutional challenge to the validity of congressional districts drawn by the Georgia state legislature.

However, a relaxed standard of compactness applies to districts drawn to remedy a Section 2 dilution violation. *Bush v. Vera*, ___ U.S. ___, ___ ___ ___, 116 S.Ct. 1941, 1960-61, 135 L.Ed.2d 248 (1996) (states may depart from traditional districting principles such as compactness to remedy Section 2 violation, so long as the departure is narrowly tailored). Accordingly, where a remedial district is drawn to satisfy Section 2, the district might be constitutional even though it would not be constitutional outside the remedial context.

This relaxed standard of compactness must apply in evaluating the first prong of *Gingles* as well. If the stricter *Miller* standard applied at the *Gingles* precondition stage, the *Vera* language permitting departure from traditional districting principles would be undermined, since any case requiring such departure would be weeded out at the *Gingles* stage by applying the stricter standard. Thus, the appropriate question in evaluating the first prong of *Gingles* is whether the minority population is sufficiently large and compact to create a district under the relaxed criteria set forth in *Vera*.

In this case, it does not make a difference which standard applies because the proposed majority-minority district in the Town is sufficiently compact, contiguous, and respectful of political subdivisions that it would withstand scrutiny even if it were not proposed to remedy a Section 2 violation.

B. *The Second Gingles Precondition*

Defendants concede that black voters in the Town are politically cohesive in their support for Democratic candidates over Republican candidates. In every Town Board election analyzed by plaintiffs and defendants, except for the 1985 election, a majority of blacks supported a particular Democratic candidate. Therefore, plaintiffs have proved that black voters in the Town are politically cohesive.

C. *The Third Gingles Precondition*

The third precondition plaintiffs must satisfy is that there is "legally significant white bloc voting" in the Town. That is, the plaintiffs must show that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority-preferred candidate. *Gingles*, 478 U.S. at 50-51, 106 S.Ct. at 2766-67; *see also Uno v. City of Holyoke*, 72 F.3d 973, 985 (1st Cir.1995) (to be legally significant, racially polarized voting in a specific community must be such that, over a period of years, whites vote sufficiently as a bloc to defeat minority candidates most of the time). As noted earlier, *Gingles* instructs that "in general, a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." *Gingles*, 478 U.S. at 56, 106 S.Ct. at 2769. However, depending on the features of a particular electoral system, such as the presence or absence of other dilutive practices (*e.g.*, majority vote requirements or prohibitions on single-shot voting), the size of the jurisdiction, the number of seats open, and the number of

candidates in the field, the degree of white bloc voting that will generally preclude the black voters from electing their preferred candidate will vary from case to case. *Id.*

Critical to the analysis of whether minorities have been able to elect their preferred candidates is identifying what a "minority-preferred candidate" is. Although this term was not defined in *Gingles*, 478 U.S. at 51, 106 S.Ct. at 2766-67, district judges in this circuit have guidance from *City of Niagara Falls*, which sets forth the following rule:

> For purposes of analyzing the third prong of *Gingles*, in § 2 cases in which the plaintiffs seek to replace an at-large, multimember electoral system with a series of single-member districts of which one or more would be a so-called majority-minority district, a candidate cannot be "minority-preferred" if that candidate receives support from fewer than 50% of minority voters. When a candidate receives support from 50% or more of minority voters in a general election, a court need not treat the candidate as minority-preferred when another candidate receiving greater support in the primary failed to reach the general election. Finally, even if a candidate receives 50% or more of the minority vote, a court need not treat the candidate as minority-preferred if another candidate receives significantly higher support.
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> * * *
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> This rule means that, in any given election in a multimember scheme – where more than one contestant is elected to office in one election – a court may treat more than one candidate as the "minority's preferred candidate," or none at all.

City of Niagara Falls, 65 F.3d at 1019.

It is undisputed in this case that whenever a black Democratic candidate ran for the Town Board, he or she was the most preferred candidate among black voters and in all but one election the black Democrat garnered over 50% of the black vote.[29] It is also undisputed that in every Town Board election, except in the 1987 election, there was at least one and sometimes there were two or three minority-preferred candidates. Finally, there is no dispute that every minority-preferred candidate for Town Councilmember lost to the majority-preferred candidate as a result of white voters voting for candidates the black voters did not support. Accordingly, there is a persistent pattern of racially polarized voting in Town Board elections that consistently has resulted (and will result in the future) in the defeat of the minority-preferred candidate. I conclude that this is sufficient to satisfy the third *Gingles* precondition, *i.e.*, that there is legally significant white bloc voting. *Gingles*, 478 U.S. at 60, 106 S.Ct. at 2771.

D. *The Totality Of The Circumstances*

As set forth in Part I, the satisfaction of the three *Gingles* preconditions is not, standing alone, sufficient to establish a § 2 violation. I must now consider whether the totality of all the relevant circumstances reveals that the at-large electoral system for the Town Board impairs the

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[29] In all but the 1993 election an African-American Democrat ran for office. In 1993, the most preferred candidate among African-American voters was a white Democratic candidate, Vivian DeJong.

ability of black voters to participate equally in the political process and to elect candidates of their choice. I conclude that the answer is yes, and that this feature of the Town government therefore violates Section 2 of the Voting Rights Act.

I have set forth in Part II, *supra*, my factual findings with regard to the Senate Report factors to be considered in evaluating the totality of the circumstances, and will not repeat those findings here. By way of summary, however, my analysis has led me to conclude as follows.

Although there is no history of *de jure* discrimination in the Town, the "non-voting" purging provision of New York Election Law and, to a somewhat lesser extent, the literacy test used by the Town until 1969 had a meaningful adverse impact on the registration of black voters. The disparate socioeconomic status of blacks in the Town tends to further depress their political participation, albeit not dramatically.

Racially polarized voting in the Town is significant and persistent. The invidious effect of these divergent voting patterns is especially apparent where, as in this case, the district is large in relation to the total number of legislators, the entire legislature is elected at-large, and there is no provision for at-large candidates running from geographic subdistricts. *Whitcomb v. Chavis*, 403 U.S. at 143-44, 91 S.Ct. at 1869-70 (citing *Fortson v. Dorsey*, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965)); *Burns v. Richardson*, 384 U.S. 73, 88, 86 S.Ct. 1286, 1294-95, 16 L.Ed.2d 376 (1966).

If, as the Supreme Court has observed, "[o]ne may suspect vote dilution from political famine," *Johnson v. De*

Grandy, 512 U.S. at 1017, 114 S.Ct. at 2660, then one may strongly suspect vote dilution in the Town of Hempstead. The black-preferred candidates for Town Councilmember have not been elected. The one black who was elected was not preferred by the black voters, and indeed was not even preferred by the leading black Republicans. Practically speaking, blacks have been shut out of the Town Board elections, a result made possible by the at-large system, which unfairly minimizes their demonstrated voting strength, and the Republican Party's slating process.

The Town Board has remained largely unresponsive to the particularized needs of the black communities in the Town, a state of affairs that I conclude is fostered (if not caused) by the multimember district. At-large elections mean that no Town Councilmember is accountable to blacks, and thus no one is held accountable for neglecting the needs of their communities. No one has the political incentive to breach the "oneness" of the current Town government.

The defense of this form of government, which has prejudiced blacks significantly, is based on a view of the Town which, described charitably, is anachronistic. The Town Supervisor testified that there is a "suburban mentality" that "is the same throughout [the Town]". The evidence in this case virtually compels a contrary conclusion; the Town of Hempstead is huge, and its more than 50 communities have many different needs, problems and concerns.

This insulation of Town Councilmembers from the black communities is exacerbated by the inaccessibility of

the Republican Party's slating process to blacks in the Town. Blacks are indeed welcome in the Republican Party, and a small number have thrived there, receiving appointments to significant positions in local government. But the office of Town Councilmember has remained, as a practical matter, off limits to black Republicans. I categorically reject the defendants' assertion in closing argument that as long as the Democratic Party is open to black participation, the Republican Party can exclude blacks entirely.[30] That argument cannot be reconciled with the practical, functional approach mandated by Section 2. In the Town of Hempstead, access to the Democratic Party's slating process does not constitute an opportunity for blacks "to elect representatives of their choice." If it did, defendants' argument may present a different question, one I need not address in this case, where diminished access to the Republican Party's slating process is the functional equivalent of diminished access to the political process itself.

The political insulation between the black communities and the Town Board that results from the at-large system may also account for the board's unresponsiveness to concerns about racial prejudice. The Town is not required to implement affirmative action programs to

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[30] *See* Tr. 2041:

> The Court: Suppose the Republican Party said no blacks need apply, we don't want blacks in our party. Is it your position [that] as long as that is not the case with the Democrats, that's sufficient in terms of equal access to overcome [a] Section 2 claim?

[Counsel For Defendants]: Yes, your Honor.

benefit (for example) minority employees or minority-owned companies that seek to do business with the Town. However, the misapprehension by Town officials of what the term "affirmative action" means reflects a profound callousness toward the needs and concerns of the black communities. This callousness is further reflected in the lame response by the Town to instances of overt racial animus in Town workplaces. These circumstances do not compel the conclusion that the Town officials are racists; I make no such finding with regard to Mr. Peterson and Mr. Fisher, the two defendants who testified in this case. Rather, these facts suggest to me that the black communities, on balance, have been to a significant extent neglected by the Town government, and the political processes by which that might be corrected are not equally open to the participation of blacks in the Town – even black Republicans.

The subtle racial appeals in campaign literature distributed by certain Republicans further distanced blacks from Town government. A class of people that is not welcome in the Town itself – and I conclude that this was the subtle message of the campaign literature at issue – cannot fairly be said to have equal access to the Town government. Again, this conclusion should not be overstated: I do not conclude that the people in the Town of Hempstead are racially biased, or that they have resisted the steady integration of the Town. However, the efforts by certain Republicans to arouse (and capitalize on) such sentiments is a significant factor in the totality of the circumstances.

Finally, the policy underlying the Town's continued use of the at-large system is especially tenuous. The Town

Supervisor claims that carving the Town into districts is a bad idea because it will cause council members to become "parochial." This view is based on the shaky (to put it mildly) premise that legislators elected at-large in the Town transcend petty political concerns in governing the Town, and simply do the "right thing."

1. *The Effect Of Partisan Politics*

Defendants contend that partisan affiliation, not race, best explains the divergent voting patterns among black and white voters in the Town, and that the racially polarized voting thus cannot be "legally significant" within the meaning of *Gingles*. They argue that "in order to rebut proof of partisanship, and in order to establish legally significant racial bloc voting, plaintiffs must prove that the Town's political parties serve as proxies for illegitimate racial bias," an inquiry that "focuses exclusively on *voter* (*i.e.*, resident) behavior." Defendants' Post-Trial Findings Of Fact And Conclusions Of Law at 65-66 (emphasis in original). The "critical question," according to defendants, is whether the white bloc voting "arises from racial bias in the community rather than from partisan politics." *Id.* at 59-60, 106 S.Ct. at 2770-71; *see also* Tr. 2074. If plaintiffs cannot prove that such bias infects the voting community, defendants contend, the Section 2 claim must fail. In support of this argument, defendants cite *Nipper v. Smith*, 39 F.3d 1494 (11th Cir.1994) (en banc), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1795, 131 L.Ed.2d 723 (1995); *League of United Latin American Citizens v. Clements*, 999 F.2d 831 (5th Cir.1993), *cert. denied*, 510 U.S. 1071, 114

S.Ct. 878, 127 L.Ed.2d 74 (1994); and *Reed v. Town of Babylon*, 914 F.Supp. 843 (E.D.N.Y.1996).

I disagree. I conclude that neither the existence (or non-existence) of racial bias in the community nor the strength of the correlation between partisan politics and divergent voting patterns can be dispositive in a Section 2 case. Rather, they are simply among the many factors to be considered in determining whether, under the totality of the circumstances, an at-large scheme has impaired the ability of black voters in the Town to participate equally in Town Board elections.

There was disagreement among the Justices of the Supreme Court in *Gingles* over whether the causes of white bloc voting are relevant at all in a Section 2 case. Justice Brennan, joined by three other justices, stated that legally significant white bloc voting "means simply that the race of voters correlates with the selection of a certain candidate or candidates; that is, it refers to the situation where different races . . . vote in blocs for different candidates." *Gingles*, 478 U.S. at 62, 106 S.Ct. at 2772. According to Justice Brennan's opinion, the *reasons* black and white voters vote differently have no relevance to the central inquiry of § 2. *Id.* at 62, 106 S.Ct. at 2772. Rather,

> [T]he critical question in a § 2 claim is whether the use of a contested electoral practice or structure results in members of a protected group having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

* * *

> It is the *difference* between the choices made by blacks and whites – not the reasons for that difference – that results in blacks having less opportunity than whites to elect their preferred representatives. Consequently, we conclude that under the "results test" of § 2, only the correlation between race of voter and selection of certain candidates, not the causes of the correlation, matters.
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> * * *
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> Focusing on the discriminatory intent of the voters, rather than the behavior of voters . . . asks the wrong question. All that matters under § 2 and under a functional theory of vote dilution is voter behavior, not its explanations. Moreover, as we have explained in detail . . . requiring proof that racial considerations actually *caused* voter behavior will result – contrary to congressional intent – in situations where a black minority that functionally has been totally excluded from the political process will be unable to establish a § 2 violation.

Id. at 63, 73, 106 S.Ct. at 2773, 2778 (emphasis in original).

Five justices in *Gingles* did not join in this section of Justice Brennan's opinion, and Justices White and O'Connor wrote separate opinions on the subject. Justice White rejected the notion that the race of the *candidates* is irrelevant. He wrote that Section 2 cannot properly be invoked where black candidates were being elected as Republicans but defeated as minority-preferred Democrats, as "[t]his is interest-group politics rather than a rule hedging against racial discrimination." *Gingles*, 478 U.S. at 83, 106 S.Ct. at 2783.

Justice O'Connor, joined by Chief Justice Burger and Justices Powell and Rehnquist, wrote that Justice Brennan's test for vote dilution came too close to granting a right to proportional representation, in violation of Congress's intent and explicit statement in § 2 that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." Justice O'Connor explained that the 1982 amendment was a legislative compromise: plaintiffs were freed of the burden of proving discriminatory purposes, and could proceed by establishing "discriminatory results;" but a pure "results" test, *i.e.*, proportional representation, was explicitly rejected. *Id.* at 84, 106 S.Ct. at 2783-84. Construing this compromise legislation "is not an easy task." *Id. See also Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 359 (7th Cir.1992), *cert. denied*, 508 U.S. 907, 113 S.Ct. 2334, 124 L.Ed.2d 246 (1993) ("Any compromise that seeks to have things both ways, as this one did, produces nightmares in implementation.") Accordingly, Justice O'Connor concluded that it is indeed relevant to the "overall vote dilution inquiry" that divergent racial voting patterns may be explained by causes other than race. 478 U.S. at 100, 106 S.Ct. at 2792. She wrote:

> Evidence that a candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group would seem clearly relevant in answering the question whether bloc voting by white voters will consistently defeat minority candidates. Such evidence would suggest that another candidate, equally preferred

> by the minority group, might be able to attract greater white support in future elections.
>
> I believe Congress also intended that explanations of the reasons why white voters rejected minority candidates would be probative of the likelihood that candidates elected without decisive minority support would be willing to take the minority's interest into account. In a community that is polarized along racial lines, racial hostility may bar these and other indirect avenues of political influence to a much greater extent than in a community where racial animosity is absent although the interests of racial groups diverge. Indeed, the Senate Report clearly stated that one factor that could have probative value in § 2 cases was "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group." S.Rep., at 29, U.S.Code Cong. & Admin.News 1982, p. 207. The overall vote dilution inquiry neither requires nor permits an arbitrary rule against consideration of all evidence concerning voting preferences other than statistical evidence of racial voting patterns.

Id. at 100-01, 106 S.Ct. at 2792. Justice O'Connor concluded as follows:

> [T]he evaluation of an alleged impairment of voting strength requires consideration of the minority group's access to the political process generally, not solely consideration of the chances that its preferred candidates will actually be elected. Proof that white voters withhold their support from minority-preferred candidates to an extent that consistently ensures their

> defeat is entitled to significant weight in plaintiffs' favor. However, if plaintiffs direct their proof solely towards the minority group's prospects for electoral success, they must show that substantial minority success will be highly infrequent under the challenged plan in order to establish that the plan operates to cancel out or minimize their voting strength.

Id. at 105, 106 S.Ct. at 2794-95 (citations and internal quotation marks omitted).

I agree with the defendants that a careful reading of the opinions in *Gingles* warrants the conclusion that the causes for white bloc voting must be considered. Although I find this issue to be irrelevant to the inquiry into the three *Gingles* preconditions, it is properly included as one of the factors to be considered in the totality of the circumstances inquiry. *Lewis v. Alamance County, N.C.*, 99 F.3d 600, 615 n. 12 (4th Cir.1996), *see also* Comment, *Straight Party Tickets and Redistricting Thickets: Nonracial Motivations for Voter Preferences*, 1995 U.Chi.Legal F. 505, 512 (1995).

In this case, it weighs in favor of the defendants. They presented evidence that Democratic candidates for Town Board, whether black or white, receive essentially equal levels of support, and always lose. Similarly, the one black Republican candidate for Town Board, Curtis Fisher in 1993, received essentially the same support from white voters as did the white Republican candidates. The significance of the Fisher election is blunted, if not erased, by the special circumstance of incumbency (he had been appointed to the position prior to the 1993 election), as that status has proved to be a guarantee of

success in Town Board elections. Nevertheless, I conclude that there is a strong correlation between political partisanship and the voting behavior of blacks and whites in the Town.

However, the fact that divergent voting patterns may logically be explained by a factor other than race does not end the inquiry, nor does it require plaintiffs to prove racial bias in the community or that political parties in the Town serve as "proxies" for racism. The relevant factors here are not mutually exclusive. It is possible for race-neutral factors, such as political partisanship, to coexist with race-based ones, such as diminished access to the slating process or insensitivity by elected officials to the particularized needs of the minority community. Thus, "even if [proof of a race-neutral cause of divergent voting patterns] is forthcoming, the defendant does not automatically triumph. Instead, the court must determine whether, based on the totality of the circumstances . . . , the plaintiffs have proven that the minority group was denied meaningful access to the political system on account of race." *Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir.1995).

In evaluating all of the relevant facts as a whole, including the size of the Town, the absence of geographic subdistricts, the lack of access by blacks to the Republican Party slating process, the unfortunate use of racial appeals in political campaigns, the lack of responsiveness by the Town Board to the particularized needs of the black communities, and the stated desire by the Town government to cling to a monolithic, single-voice legislature for a heterogeneous population consisting of many different communities and voices, I conclude that black

citizens' failure to elect representatives of their choice to the Town Board is not best explained by partisan politics. Rather, black citizens' inability to elect their preferred candidates is best explained by the fact that the political processes leading to elections and the slating of candidates for them are not equally open to the participation of blacks.[31]

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[31] Defendants rely especially heavily on *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357 (7th Cir.1992), which they claim is virtually identical to this case. The vote dilution claim in *Baird* challenged four at-large seats in a 29-member City-County Council. The other twenty-five seats were elected from single-member districts, of which seven were majority-minority. Plaintiffs conceded that the single member districts complied with Section 2 because they gave black voters, who comprised 19.28% of the voting population, control over 24.14% of the seats in the legislature. They nevertheless challenged the four at-large seats on the ground that four large single-member districts could be drawn in such a way that blacks would constitute a majority in one of them. 976 F.2d at 358. The district court had granted summary judgment for defendants, and the Seventh Circuit affirmed.

The Seventh Circuit observed "that losses by the candidates black voters prefer may have more to do with politics than race." *Id.* at 361. The court observed that Marion County was a "Republican stronghold" in which voters "seem to prefer Republicans but do not necessarily judge their Republicans by color." *Id.* Indeed, although the Republicans had won all four at-large seats by comfortable margins, one of the four victors in the 1991 elections was black. Citing the opinions of Justice White and Justice O'Connor in *Gingles*, the Seventh Circuit found the election of a black Republican relevant to the question whether the black voters' right to vote had been abridged "on account of race or color," as required by Section 2. *Id.*

Defendants' reliance on the similarities between this case and *Baird* (the Republican dominance, the strong correlation

CONCLUSION

African-Americans in the Town of Hempstead have no right to be represented on the Town Board. They have no right to be protected from political defeat at the polls, even if that defeat is total and persists for decades. African-Americans do have a right, however, which is protected by Section 2 of the Voting Rights Act of 1965, to an even playing field. They have a right to be given a fair shake by the political processes leading to nominations and elections to the Town Board.

Determining whether an at-large election scheme violates that right requires "an intensely local appraisal" of the impact such a scheme has "in the light of past and present reality, political and otherwise." *White v. Regester*,

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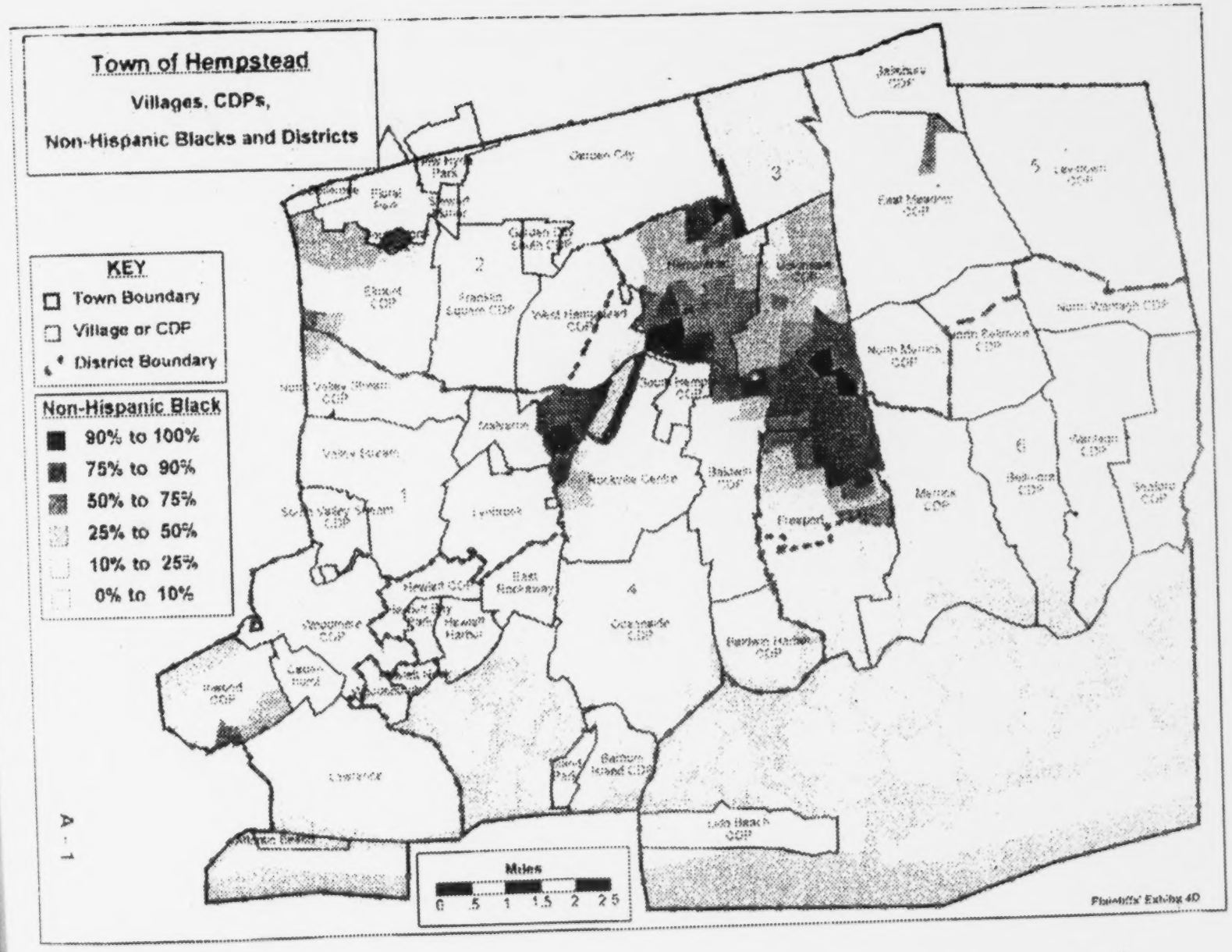
between partisanship and voter behavior, the election of a black Republican) overlooks a critical difference. The hybrid legislature at issue in *Baird*, with its seven single-member minority-dominated districts, gave the black voters proportional representation. Section 2 requires a showing that, under the totality of the circumstances, the challenged electoral practice results in unequal access, and the Seventh Circuit held that "[t]he 'totality of the circumstances' in this case *guarantee* black voters control over at least seven seats in the Council." *Id.* at 362 (emphasis added). In the Town of Hempstead, the candidates of choice of the black voters have never been elected even once, let alone in numbers (and from districts) that guarantee significant representation.

Moreover, defendants' reliance on *Baird*'s holding that proof of the three *Gingles* factors is "not enough" ignores the caveat: it is "not enough . . . if other considerations show that the minority has an undiminished right to participate in the political process." 976 F.2d at 359; *see also Johnson v. DeGrandy*, 512 U.S. at 1012 n. 10, 114 S.Ct. at 2657 n. 10. As set forth above, there is no such undiminished right to participation here.

412 U.S. 755, 769-70, 93 S.Ct. 2332, 2341, 37 L.Ed.2d 314 (1973). Having conducted the careful and searching appraisal mandated by Section 2, I have a definite and firm conviction that the at-large scheme employed for Town Board elections in Hempstead has operated to invidiously exclude blacks from effective participation in political life in violation of Section 2.

Accordingly, the Town Board is hereby ordered to submit to the Court a remedial plan that divides the Town into six single-member districts. The schedule for the submission of the proposed plan, and for objections thereto, shall be the subject of a status conference to be held on February 27, 1997 at 9:30 a.m.

So Ordered.



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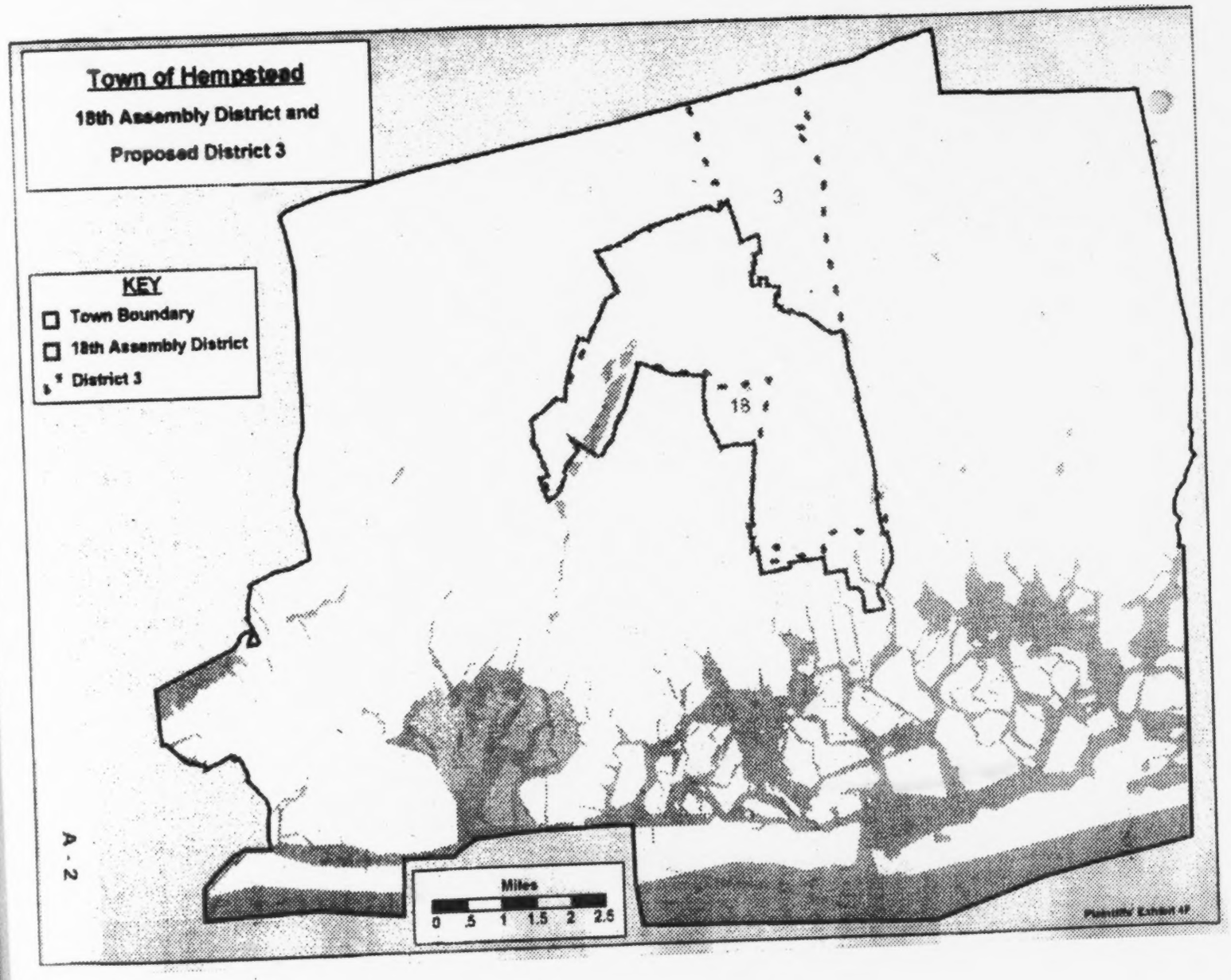
Town of Hempstead
18th Assembly District and
Proposed District 3
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Town Boundary
18th Assembly District
District 3
3
18
Miles
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A - 2

Dorothy GOOSBY, Samuel Prioleau, Xavier Morales, and Miladys Morales, Plaintiffs,

v.

TOWN BOARD OF the TOWN OF HEMPSTEAD, NEW YORK, Gregory P. Peterson, Richard A. Zagarino, Curtis Fisher, Joseph Ra, Anthony Santino, Joseph Kearney, in their official capacities as members of the Town Board of the Town of Hempstead, Nassau County Board of Elections, John DeGrace and Steven Sabbeth, in their official capacities as Commissioners of Elections of Nassau County, Defendants.

No. 88-CV-2453 (JG).

United States District Court,
E.D. New York.

Oct. 20, 1997.

Frederick K. Brewington, Hempstead, NY, and Randolph M. Scott-McLaughlin, Center for Constitutional Rights, New York, NY, for Plaintiffs.

Leonard B. Austin, Huntington Station, NY, for Defendant Steven Sabbeth.

Joseph J. Ortego, Evan H. Krinick, Kenneth A. Novikoff, Rivkin, Radler & Kremer, Uniondale, NY, for Defendant, Town Board of Town of Hempstead.

John E. Ryan, Floral Park, NY, for Defendant John DeGrace.

MEMORANDUM, ORDER AND PERMANENT INJUNCTION

GLEESON, District Judge.

Plaintiffs brought this action against the Town Board of the Town of Hempstead ("the Town Board") and other defendants alleging violations of Section 2 of the Voting Rights Act of 1965 and the United States Constitution. On February 20, 1997, I concluded that the at-large system used for electing members of the Town Board operates to invidiously exclude black voters from effective participation in political life in the Town of Hempstead ("the Town"), in violation of Section 2. I ordered the Town Board to submit a remedial plan that divides the Town into six single-member voting districts. *See Goosby v. Town Board of the Town of Hempstead*, 956 F.Supp. 326, 356 (E.D.N.Y.1997).

On May 16, 1997, the Town Board submitted two proposals. The first, which it urges me to adopt, is a highly unusual two-district plan. One of the two districts is a single-member majority-minority district that is identical to the majority-minority district proposed by plaintiffs at trial. However, under the Town Board's two-district plan, the rest of the Town is a single, multi-member district for the election of the remaining five members of the Town Board. A rough map of the two-district plan is appended to this decision at A-1.

The second proposed plan, which the Town advances only in the event I reject the first, is a six-district plan that is substantially similar to the plan proposed by plaintiffs at trial. A rough map of the plan is appended at A-2; a

precise description of the plan by Census tract and block follows at A-3 through A-10.

Plaintiffs oppose the two-district plan, contending that it violates the Fourteenth and Fifteenth Amendments to the United States Constitution and Section 2 of the Voting Rights Act of 1965. They have no objection to the six-district plan proposed in the alternative.

For the reasons set forth below, I conclude that the two-district plan proposed by the Town Board is unconstitutional, and thus may not be implemented to remedy the Section 2 violation. The Town Board's alternative proposal – the six-district plan – is constitutional, and I hereby order that it be implemented. The implementation of this remedial plan is stayed pending appeal. Plaintiffs recently filed motion to enjoin the upcoming election is denied.

DISCUSSION

Redistricting is a legislative task that federal courts "should make every effort not to pre-empt." *Wise v. Lipscomb*, 437 U.S. 535, 539, 98 S.Ct. 2493, 2497, 57 L.Ed.2d 411 (1978). Where a court has struck down a voting system, it must give the appropriate elected body an opportunity to propose a remedial plan. *See id.* at 540, 98 S.Ct. at 2497. If it submits such a plan, the court must accord the proposal substantial deference. It does not matter whether the court considers the proposal the "best" plan, and it may not reject the plan to adopt what it considers to be a better one. Rather, the court's role is only to consider whether the plan proposed by the

elected body is legally acceptable, *i.e.*, whether it comports with the requirements of the Voting Rights Act and the Constitution. *See Upham v. Seamon*, 456 U.S. 37, 42-43, 102 S.Ct. 1518, 1521-22, 71 L.Ed.2d 725 (1982).

A. *The Scope of Review*

The first step in assessing a proposed Section 2 remedy is determining whether it is legislative or judicial. This categorization affects the scope of review. For example, a judicially crafted remedy may not employ multi-member districts " 'absent insurmountable difficulties' " in using single-member districts. *Chapman v. Meier*, 420 U.S. 1, 18, 95 S.Ct. 751, 761-62, 42 L.Ed.2d 766 (1975) (quoting *Connor v. Johnson*, 402 U.S. 690, 692, 91 S.Ct. 1760, 1762, 29 L.Ed.2d 268 (1971)); *see McDaniel v. Sanchez*, 452 U.S. 130, 139, 101 S.Ct. 2224, 2230-31, 68 L.Ed.2d 724 (1981). Also, since " 'reapportionment is primarily the duty and responsibility of the State,' " the Supreme Court has tolerated "greater flexibility" in applying the one-person, one-vote requirement to legislatively crafted plans. *Id.* at 139, 101 S.Ct. at 2230-31 (quoting *Chapman*, 420 U.S. at 27, 95 S.Ct. at 766). A court-crafted plan, on the other hand, " 'must ordinarily achieve the goal of population equality, with little more than *de minimis* variation.' " *Id.* (quoting *Chapman*, 420 U.S. at 26-27, 95 S.Ct. at 765-66).[1]

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[1] Legislative plans are also distinct from judicial plans in that legislative plans submitted from jurisdictions covered by Section 5 of the Voting Rights Act must be pre-cleared in accordance with Section 5. *See* 42 U.S.C. § 1973c. However, since the Town of Hempstead is not a covered jurisdiction, *see* 28 C.F.R. pt. 51 app., Section 5 is not implicated here.

The key factor in determining whether a proposed remedy is legislative or judicial is whether the proposal reflects "the policy choices of the elected representatives of the people." *McDaniel,* 452 U.S. at 153, 101 S.Ct. at 2238. The legislative body's legal authority to enact a reapportionment plan is not dispositive. *See id.* at 152, 101 S.Ct. at 2237-38. Rather, "the essential characteristic of a legislative plan is the exercise of legislative judgment." *Id.* "The fact that a reapportionment plan was crafted in response to an order of a federal court does not *change* its essential character as a legislative plan." *Id.* at 146, 101 S.Ct. at 2234.

Although proposed in compliance with an order of this Court, the plans proposed by the Town Board clearly reflect the policy choices of its members. The Town Board employed an expert, Dr. Harold W. Stanley, to devise its proposals. The six-district back-up plan draws on the proposal made by plaintiffs at trial, but does not adopt it wholesale. In developing its plans, the members of the Town Board, acting as elected representatives of the people of the Town,[2] placed their imprimatur on the plans. I conclude that the plans reflect policy choices made by the Town Board and as such must be considered legislative plans.

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[2] In determining whether the plans are legislative or judicial, I place no significance on the fact that the Town Board prefers the two-district plan over the six-district plan. The fact that the six-district plan is offered only in the alternative; *i.e.*, in the event I reject the two-district plan, does not alter the fact that it was crafted entirely by a legislative body, reflecting its policy choices.

B. *The Constitutionality of the Plans*

A reapportionment plan adopted in order to remedy a violation of Section 2 of the Voting Rights Act must be constitutional. In reviewing the plans proposed by the Town Board, two constitutional requirements are relevant: the one-person, one-vote requirement and the prohibition on improper use of race in districting.

1. *One-Person, One-Vote*

The Equal Protection Clause requires that apportionment be based on the general principle of population equality, *i.e.*, "one-person, one-vote." *Reynolds v. Sims*, 377 U.S. 533, 568, 84 S.Ct. 1362, 1384-85, 12 L.Ed.2d 506 (1964). This principle applies to apportionment for local elections as well as state and federal elections. *See Abate v. Mundt*, 403 U.S. 182, 185, 91 S.Ct. 1904, 1906-07, 29 L.Ed.2d 399 (1971). In some circumstances, precise equality of population is required. *See Karcher v. Daggett*, 462 U.S. 725, 744, 103 S.Ct. 2653, 2665-67, 77 L.Ed.2d 133 (1983) (congressional districting plans that are not "functionally equal" in population violate Equal Protection Clause; districts varied 0.6984% in population). However, plans for the election of state legislators are accorded greater flexibility in the application of the one-person, one-vote rule. The Supreme Court has held that such apportionment plans generally satisfy the one-person, one-vote requirement if they have a maximum population deviation among districts of less than 10%. *See Brown v. Thomson*, 462 U.S. 835, 842, 103 S.Ct. 2690, 2695-96, 77 L.Ed.2d 214 (1983); *see also White v. Regester*, 412 U.S. 755, 764, 93 S.Ct. 2332, 2338-39, 37 L.Ed.2d 314 (1973). The

Court also has recognized that "slightly greater percentage deviations may be tolerable for local government apportionment schemes." *Abate*, 403 U.S. at 185, 91 S.Ct. at 1907 (approving population deviation of 11.9% for local government in Rockland County, New York).

The Town of Hempstead has a total population of 725,639. The ideal district population for a six-district plan would be 120,939. The total population in District 1, the proposed majority-minority district, would be 117,884, a deviation of 2.53% from the ideal. The total population of the proposed multi-member district 2 would be 607,755, which would deviate from the ideal by .51%. Given the "greater flexibility" accorded state and local governments, *McDaniel*, 452 U.S. at 138, 101 S.Ct. at 2230, I conclude that these deviations from the ideal population are constitutional.

The Town Board's six-district plan also satisfies the one-person, one-vote requirement. District 5 is the smallest district, with a population of 117,751; District 4 is the largest district, with a population of 124,754. The total population deviation is therefore 7,003 – a total deviation of 5.79% from the ideal district size. This population deviation is well within the limits established by the Supreme Court.

2. *"Wrongful Districting"*

In *Shaw v. Reno*, 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (*"Shaw I"*), the Supreme Court recognized a new cause of action, under the Equal Protection Clause of the Fourteenth Amendment, that places limits on the use of race in districting. Specifically, "a plaintiff

challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." *Id.* at 649, 113 S.Ct. at 2828. This cause of action has been referred to as "wrongful districting" *See* Pamela S. Karlan, "Still Hazy After All These Years: Voting Rights In The Post-Shaw Era," 26 *Cumb. L.Rev.* 287, 290 (1996).

In recognition of the fact that districting is virtually always race-conscious, a plurality of the Supreme Court has observed that the "strict scrutiny" envisioned by *Shaw I* does not apply to all districting schemes in which race is a factor, even if they result in the intentional creation of majority-minority districts. Rather, for strict scrutiny to apply, plaintiffs must show that "race was the predominant factor motivating the legislature's decision," that is, "that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Miller v. Johnson*, 515 U.S. 900, 916, 115 S.Ct. 2475, 2488, 132 L.Ed.2d 762 (1995); *see Bush v. Vera*, 517 U.S. 952, ___, 116 S.Ct. 1941, 1954, 135 L.Ed.2d 248 (1996); *Shaw v. Hunt*, 517 U.S. 899, ___, 116 S.Ct. 1894, 1902, 135 L.Ed.2d 207 (1996) (*"Shaw II"*). If a challenge to a districting plan meets this threshold burden of proving that race was the predominant factor motivating the legislature, strict scrutiny applies; unless the challenged features of the plan are narrowly tailored to serve a compelling state interest, the plan must be invalidated as

unconstitutional. *See Bush*, 517 U.S. at ___, 116 S.Ct. at 1951.

The foregoing arguably oversimplifies the state of this new cause of action. The members of the Supreme Court are divided in several critical respects. For example, at least three justices apparently believe that strict scrutiny should be applied to all cases in which majority-minority districts are intentionally created. *See id.* at ___-___, 116 S.Ct. at 1971-72 (Kennedy, J. concurring); *id.* at ___-___, 116 S.Ct. at 1972-74 (Thomas, J., concurring). The Court is similarly divided over the question of whether compliance with Section 2 of the Voting Rights Act of 1965 is a compelling state interest that justifies race-conscious districting. It has assumed that to be the case without deciding the issue, *see, e.g., id.* at ___, 116 S.Ct. at 1960, but Justice O'Connor's separate concurring opinion in *Bush v. Vera*, expressing her view that such compliance is a compelling state interest, was not endorsed by the justices who joined her plurality opinion, *see id.* at ___-___, 116 S.Ct. at 1968-70.

These are difficult issues, and the deep divisions within the Supreme Court have prevented it from providing much-needed guidance to lower courts "as they toil with the twin demands of the Fourteenth Amendment and the Voting Rights Act." *Id.* at ___, 116 S.Ct. at 1968 (O'Connor, J., concurring). I nonetheless conclude that there is no view of race-conscious districting that would fail to subject the two-district plan proposed here to strict scrutiny. I also conclude that even if a legislature's effort to remedy an actual violation of Section 2 entitles it to greater leeway in considering race, the two-district plan must be rejected as unconstitutional.

As for the six-district alternative plan, it does not warrant strict scrutiny; even if it did, it would survive constitutional attack.

a. *The Two-District Plan*

(i) *The Nature of the Proposed Plan*

The Town Board seeks to defend its proposed two-district plan with several arguments. One is its assertion that courts, including the Supreme Court, have consistently upheld as constitutional electoral schemes "consisting of a mixture of single-member and multi-member districts." Memorandum at 8.[3] The Town Board seeks support from a number of cases in which such plans have been approved, and proclaims that the proposed two-district plan is "functionally indistinguishable from" the plan upheld by the Fourth Circuit in *Hines v. Mayor & Town Council of Ahoskie*, 998 F.2d 1266 (4th Cir.1993). Reply Memorandum at 6. This argument is misleading. The Town Board's description of its two-district plan as a "mixed" electoral scheme akin to those in the cases it cites obscures a critical distinguishing feature of the Town's proposed plan. In fact, a more careful examination of the proposed scheme reveals that it is quite unusual.

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[3] "Memorandum" refers to the undated Memorandum Of Law In Support Of The Defendant Town Board Of The Town Of Hempstead's Proposed Remedial Plan. "Reply Memorandum" refers to the June 6, 1997 memorandum submitted in further support of the plan.

There are three electoral formats commonly used by municipal governments in the United States: at-large systems, single-member district systems, and mixed systems. In an at-large system, all members of the legislative body are elected from a district that includes all members of the electorate. In a single-member district system, the legislators are elected from compact, contiguous and essentially equipopulous districts. In a mixed system, some members of the legislature are elected from single-member districts, while other members, usually a smaller number, are elected at large.[4] In a typical mixed system, the districts cover the entire municipality. Thus, each voter is represented both by one or more legislators elected from a district and one or more legislators elected at large.

As noted above, the Town Board relies on several cases involving these mixed systems.[5] *Hines*, for example, endorsed an election plan that divided the Town of Ahoskie, North Carolina into two districts, one majority-black and the other majority-white. Two Town Council

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[4] A small number of municipal governments elect multiple members of the legislature from districts. These "multi-member district systems" may, on occasion, also include at-large seats as well.

[5] In addition to the Fourth Circuit's decision in *Hines*, the Town Board cites *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357 (7th Cir.1992), *cert. denied*, 508 U.S. 907, 113 S.Ct. 2334, 124 L.Ed.2d 246 (1993); *Tallahassee Branch of NAACP v. Leon County, Florida*, 827 F.2d 1436 (11th Cir.1987), *cert. denied*, 488 U.S. 960, 109 S.Ct. 402, 102 L.Ed.2d 391 (1988); and *James v. City of Sarasota*, 611 F.Supp. 25 (M.D.Fla.1985).

members would be elected from each district by a plurality vote, and a fifth member of the Town Council would be elected at-large from the entire town population. *See Hines*, 998 F.2d at 1269; *see also Baird*, 976 F.2d at 358 (the challenged electoral plan included 25 single-member districts and four representatives elected at-large); *Tallahassee Branch of NAACP*, 827 F.2d at 1437 (five single-member districts and two at-large seats); *James*, 611 F.Supp. at 27 (three multi-member districts for election of three representatives per district and two at-large representatives). In all of those cases, all voters were treated the same in this respect: each voter would cast a vote for one or more representatives of the voter's district and one or more at-large representatives.

The two-district plan proposed here is not such a system. If adopted, the voters in the Town of Hempstead will not be treated the same. They will not receive a combination of district and at-large representation on the Town Board. To the contrary, the plan seeks to carve the Town into two groups of voters: one-sixth of the Town will have a district representative, whereas the remainder of the population will receive the quasi-at-large representation of five members who represent the other five-sixths of the Town.

Irrespective of one's view of the "much mooted" comparative merits of the single-member versus at-large approach to local representation, *Whitcomb v. Chavis*, 403 U.S. 124, 154 n. 33, 91 S.Ct. 1858, 1874 n. 33, 29 L.Ed.2d 363 (1971), there is no dispute that these approaches result in different forms of representation. The two-district plan advanced by the Town Board thus distinguishes itself from the cases cited above by providing different

forms of representation to the people in the Town of Hempstead. This feature of the proposed plan makes it extremely unusual. The Town Board's suggestion that it is a typical "mixed" electoral scheme of the sort that has been consistently upheld, *see* Memorandum at 8, is thus inaccurate.

I recognize that this unusual mixture of single-member and multi-member districts is not unprecedented. For example, plaintiffs rely on *Simkins v. Gressette*, 631 F.2d 287, 290 (4th Cir.1980), in which a reapportionment plan for the South Carolina legislature included three single-member districts and thirteen multi-member districts for the election of from two to five members each. However, the court in *Simkins* emphasized that there was not the "slightest evidence" of racial motivation in the classification of the voters into the different types of districts. *Id.* at 292 (quoting *McCollum v. West*, No. 71-1211 (D.S.C. Apr. 7, 1972)). Moreover, I have found no case involving a challenge to a hybrid plan like the one proposed here, *i.e.*, one single-member district and one multi-member district. In short, the precise electoral plan advocated by the Town Board would be highly unusual, perhaps unique, in the annals of municipal electoral formats in this country. I have no doubt that, if accepted, it would be the only electoral scheme with a highly distinctive feature attributable solely to a racial classification.[6]

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[6] The Town Board relies on a consent decree in *Jackson v. City of Salisbury, Maryland*, Civ. No. Y-86-587, slip op. at 3 (D. Md. June 23, 1987). Upon the agreement of the parties in that case, the district court ordered that city council elections occur under a plan providing for a majority-minority single-member district and a multi-member district for the election of the four

(ii) *The Necessity for Strict Scrutiny*

The sole basis for this extraordinary system – for this formal political division of the people in the Town of Hempstead – is race.[7] There has been no attempt to justify it by reference to a single traditional districting principle. Although the Town Board makes passing reference to its belief that local government "operates better when elected officials must answer to the entire electorate," and to the preference in New York State for the "at-large system" of town government, Memorandum at 17, those principles obviously played no role in the proposed system. If the Town Board has its way, no member of the

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other members. A similar hybrid system was also created by a consent decree in *NAACP v. Spartanburg County Board of Education*, No. 7: 91-3111-20, slip op. at 2 (D.S.C. Apr. 18, 1994). The hybrid plans in those cases (one of which predates *Shaw I*) were of course the product of accommodation and cooperation among black voters and local governments, and the approval of the consent orders no doubt encouraged such conduct. I express no view on the question whether the two-district plan in this case would be acceptable if it came to me by way of agreement. *See Stovall v. City of Cocoa, Florida*, 117 F.3d 1238, 1242 (11th Cir.1997) (a district court should reject a consent decree in a voting rights case if it determines the decree to be unreasonable, unfair or unconstitutional). In any event, I do not regard either of the cited cases as equivalent to a holding that the sort of relief proposed here is constitutional.

[7] The segregation effected by the Town Board's two-district plan is almost total. Ninety-seven percent of the black voters in the Town of Hempstead are placed in District 1, which has an overall population that is over 58% black. By contrast, District 2 (*i.e.*, the balance of the Town) is over 97% non-black.

Town Board would "answer to the entire electorate," and none would be elected at-large.[8]

Rather, it has proposed a system that it grudgingly admits in is reply memorandum is "atypical," Reply Memorandum at 2, based solely on racial considerations. The Town Board does not even deny plaintiff's claims that the two-district plan evokes images of apartheid, and resembles India's reserved seats for scheduled castes. Instead, it places the blame for this on plaintiffs: "If the plan smacks of apartheid, or resembles the 'set aside' seats of India, it is because District I was drawn along racial lines, at plaintiffs' insistence, and not because there is only one other district instead of five." Reply Memorandum at 5 (citation omitted). In short, strict scrutiny must be applied to the two-district plan because race is not merely the predominant factor motivating the classification of the voters, it is the *only* factor.

(iii) *Plaintiffs' "Standing" to Challenge the Two-District Plan*

The Town Board contends that once plaintiffs get their majority-minority district, the electoral plan for the

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[8] The Town Board acknowledges that "the most common system adopted by jurisdictions that wish to retain some aspect of jurisdiction-wide representation is a combination of single-member districts and at-large seats," but asserts that "[i]n the Town, however, the small portion of the electorate that is black precludes this option." Reply Memorandum at 8. I disagree. There is no minimum percentage of black voters that is necessary for a truly mixed electoral scheme, and the percentage of black voters in the Town did not "preclude" the Town Board from proposing one.

rest of the Town is none of their business.[9] The Town Board does not explicitly contend that plaintiffs lack standing to challenge the two-district plan. Nor could it; as residents of the district that the Town Board seeks to isolate from "townwide" representation on racial grounds, plaintiffs obviously have the standing to allege wrongful districting. *See United States v. Hays*, 515 U.S. 737, 744-46, 115 S.Ct. 2431, 2436, 132 L.Ed.2d 635 (1995) (plaintiffs residing in a racially gerrymandered districts "may suffer the special representational harms racial classifications can cause" and thus have standing to challenge them). However, the Town Board's argument suggests that plaintiffs, having received their remedy for the vote dilution that violated Section 2, have no cognizable objection to the unusual hybrid electoral plan created to afford them that relief.

This argument misapprehends the nature of the cause of action identified in *Shaw I*. The new, "analytically distinct" claim of wrongful districting does not require proof that plaintiffs were denied the right to vote or that their votes were diluted. *Shaw I*, 509 U.S. at 632, 113 S.Ct. at 2819; *see* Pamela S. Karlan, "Still Hazy After All These Years: Voting Rights In the Post-Shaw Era," 26 *Cumb. L.Rev.* 287, 290 (1996). The wrongful districting cause of action prohibits the excessive use of race in drawing

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[9] *See* Reply Memorandum at 6 ("Notwithstanding the fact that plaintiffs do not like the 'look' of the two-district remedial plan, they can muster no other legally relevant objection to the plan. What plaintiffs presently avoid but must ultimately concede is that how the Town Board decides to elect the remaining five Town Board members has no effect on how blacks vote in District 1.")

district lines not because of any discrete harm to particular voters, but because it "injures voters in other ways. It reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole." *Shaw I*, 509 U.S. at 650, 113 S.Ct. at 2828. *Shaw I* thus affords relief under the Equal Protection Clause for what has been termed "*expressive* harms" – harms that result "from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about." Richard J. Pildes & Richard G. Niemi, "Expressive Harms, 'Bizarre Districts,' And Voting Rights: Evaluating Election District Appearances After *Shaw v. Reno*," 92 *Mich. L.Rev.* 483, 506-07 (1993). Therefore, even if the Town Board is correct in asserting that plaintiffs do not suffer individual, concrete harm, that does not defeat their constitutional challenge to the two-district plan.

It is difficult to conceive of a districting proposal that inflicts greater "expressive harm" than the one at issue here. The single-member district in the proposed two-district plan would of course be viewed as the seat reserved for African-Americans, while the other district would be viewed as the domain of the white voters. The separation of nearly all black citizens into one single-member district and nearly all whites into a large multi-member one "bears an uncomfortable resemblance to political apartheid." *Shaw I*, 509 U.S. at 647, 113 S.Ct. at 2827. The plan also creates the risk of pitting the member of the Town Board from the "black district" against the five members elected from the "white district." This kind

of division threatens to "balkanize us into competing racial factions" and "carry us further from the goal of a political system in which race no longer matters – a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire." *Id.* at 657, 113 S.Ct. at 2832. In short, I conclude that the Town Board's two-district proposal is the type of districting plan that *Shaw I* intended to prohibit.

Moreover, I cannot conclude that plaintiffs would suffer only these "expressive" harms if the two-district plan is adopted. There is a troubling aspect of this case that is not present in other wrongful districting cases. Other wrongful districting cases generally involve challenges to districts created to benefit minorities. Over time, these challenges will help demarcate the boundaries between appropriate and inappropriate race-consciousness in districting. For now, it appears that when such districting otherwise complies with "traditional" districting principles, it is considered constitutionally appropriate to ensure evenhanded treatment; but when race has been "singled out for exceptionally preferential treatment," the districting has been transformed from nondiscrimination into impermissible affirmative action. Richard H. Pildes, "Principled Limitations on Racial and Partisan Redistricting," 106 *Yale L.J.* 2505, 2510-11 (1997).

This case is different because the challenged conduct is not the creation of the majority-minority district itself, but of the highly unusual electoral plan in which the Town Board has embedded it. It is also different because the challenged conduct was not intended to be "preferential" treatment. Indeed, it seems like an effort to punish the black communities in the Town for successfully

breaching what the Town Supervisor described as the "oneness" of the "suburban mentality" in the Town. *Goosby*, 956 F.Supp. at 346. The unusual hybrid government would likely remedy the illegal vote dilution, but it would also punish the black communities by isolating them and their elected representative. In addition to the "expressive" harm this inflicts, the trial testimony leads me to conclude that it is designed to facilitate a concrete harm as well. Specifically, the creation of the unusual multi-member district for the remainder of the Town appears designed to enhance the ability of the Town Board to act as the Town Supervisor predicted it would act if plaintiffs prevailed in this case: parochially, in ways that will permit it to do the "wrong thing" politically with respect to the newly created "zone." *Id.* at 347. In sum, even if plaintiffs' standing to challenge the two-district plan required a showing of concrete harm, I would find that such a showing has been made.

(iv) *The Compelling State Interest*

To survive strict scrutiny, a redistricting plan must be narrowly tailored to meet a compelling state interest. *See Bush*, 517 U.S. at ___, 116 S.Ct. at 1960. As noted above, the Supreme Court has yet to address directly the question whether compliance with Section 2 of the Voting Rights Act is a compelling state interest sufficient to overcome strict scrutiny. *See id.* at ___, 116 S.Ct. at 1960. However, it appears that a majority of justices agree that it is. *See id.* at ___, 116 S.Ct. at 1969 (O'Connor, J., concurring); *id.* at ___, 116 S.Ct. at 1989 (Stevens, J., joined by Ginsburg and Breyer, JJ., dissenting); *id.* at ___, 116 S.Ct.

at 2007 (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting). Lower courts have repeatedly held that Section 2 is itself constitutional, suggesting that satisfying Section 2 would be a compelling state interest. *See id.* at ___, 116 S.Ct. at 1968 (O'Connor, J., concurring) (collecting cases). "The results test of § 2 is an important part of the apparatus chosen by Congress to effectuate this Nation's commitment 'to confront its conscience and fulfill the guarantee of the Constitution' with respect to equality in voting." *Id.* at ___, 116 S.Ct. at 1969 (O'Connor, J., concurring) (quoting S.Rep. No. 97-417 (1982), at 4, *reprinted in* 1982 U.S.C.C.A.N. 177, 181). As Justice Souter has observed, holding that Section 2 is not a compelling state interest would "bring the *Shaw* cause of action to what would be the cruelly ironic point of finding in the Voting Rights Act of 1965 (as amended) a violation of the Fourteenth Amendment's equal protection guarantee." *Id.* at ___, 116 S.Ct. at 2007 (Souter, J., joined by Ginsburg and Breyer, JJ., dissenting). Accordingly, I hold that remedying a violation of Section 2 of the Voting Rights Act of 1965 is a compelling state interest.

(v) *The Requirement of Narrow Tailoring*

In complying with my order to propose a remedy for the Section 2 violation, the Town Board was permitted to elevate race as a districting principle no more than was reasonably necessary to supply the remedy. *See Bush*, 517 U.S. at ___, 116 S.Ct. at 1961. The two-district plan clearly fails to meet this requirement. As I found in my prior decision, a majority-minority district can readily be created in the Town even if race is subordinated to the

traditional districting principles of one-person, one-vote, compactness, and conformance with existing political geography. *See Goosby*, 956 F.Supp. at 333, 350. The plan plaintiffs proposed at trial accomplished that result, as does the six-district plan proposed as an alternative by the Town Board. In light of the ready availability of these remedies, there was no need to create the bizarre hybrid two-district electoral plan the Town Board proposed, and it is difficult to fathom why the Town Board would strain so hard to create such a divisive proposal. In any event, the unusual characteristics of the two-district plan defeat any claim that the proposed plan is narrowly tailored to remedy the Section 2 violation. I reject it as violative of the Fourteenth Amendment.[10]

b. *The Six-District Plan*

The six-district plan proposed by the Town Board does not require the application of strict scrutiny. The proposal includes six reasonably compact single-member districts that are not bizarre in shape. District 1, the majority-minority district proposed by the Town Board, is identical to the majority-minority district plaintiffs proposed at trial.[11] That district, as I indicated in my February 20, 1997 decision, is more compact than the average congressional district nationwide and substantially more

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[10] In light of this conclusion, I do not address plaintiffs' contention that the two-district plan violates Section 2 of the Voting Rights Act.

[11] The Town Board's proposed District 1 is the same as plaintiffs' proposed District 3, and thus is referred to as District 3 in my prior decision.

compact than the average congressional district in the State of New York. *See Goosby*, 956 F.Supp. at 333. Districts 4, 5, and 6 in the Town Board's proposal are very similar to the corresponding districts proposed by plaintiffs, and are likewise sufficiently compact. The only district in the Town Board's proposal which even suggests a lack of compactness is District 3, which (unlike its counterpart in plaintiffs' proposal) has a finger extending north into District 2. However, the demographic data reveal that this finger was not the product of any racial motivation. Accordingly, I conclude that the districts in the Town Board's six-district proposal are sufficiently compact and do not reflect any improper emphasis on racial considerations.

In addition, the six-district proposal, as a general matter, respects local community boundaries in accordance with traditional districting principles. The proposed districts, like those proposed by plaintiffs at trial, reflect an effort to avoid dividing villages and Census Designated Places, thus maintaining communities of interest within the Town. There is no evidence that the Town Board used racial data in an effort to "make more intricate refinements on the basis of race than on the basis of other demographic information." *Bush*, 517 U.S. at ___, 116 S.Ct. at 1953. Nor is there any indication that the Town Board, in drafting its six-district proposal, addressed racial considerations any more than was necessary to comply with Section 2 of the Voting Rights Act.

In short, I conclude that although race naturally played a role in crafting the six-district plan, it was not the predominant factor. I found after the trial that a majority-minority district could be created as part of a

six-district plan even if race consciousness was subordinated to traditional districting principles. *See Goosby*, 956 F.Supp. at 333, 350. Since the Town Board proposed a substantially identical plan, it is clear that the proposed six-district plan does not warrant strict scrutiny. *See Bush*, 517 U.S. at ___, 116 S.Ct. at 1969 (O'Connor, J., concurring) ("[S]o long as they do not subordinate traditional districting criteria . . . States . . . may otherwise take race into consideration, without coming under strict scrutiny.").

Even if it were subject to strict scrutiny, the six-district plan would be constitutional. It is narrowly tailored to the goal of remedying the Section 2 violation created by the current election scheme. The proposal "substantially address[es]" and in fact achieves the "avowed purpose" of remedying the violation, *Shaw II*, 517 U.S. at ___, 116 S.Ct. at 1905, but does not go beyond what is necessary to accomplish that result, *see Shaw I*, 509 U.S. at 655, 113 S.Ct. at 2831. As discussed above, the six proposed districts are not "bizarrely shaped," but are instead compact and contiguous, and there is no evidence that the contours of the districts are "predominantly attributable to gerrymandering that was racially motivated." *Bush*, 517 U.S. at ___, 116 S.Ct. at 1961. I conclude that the six-district plan proposed by the Town Board is narrowly tailored to meet the compelling interest of remedying the vote dilution imposed on black voters in the Town in violation of Section 2 of the Voting Rights Act of 1965.

C. *The Motion to Enjoin the Upcoming Election*

On September 16, 1997, plaintiffs moved for an order enjoining the November 7, 1997, election under the present at-large system. Plaintiffs do not seek an election under the new electoral plan adopted today. Rather, they seek only to maintain the current Town Board in place. They assert that if an election is held on November 7 under the current system, the African-American communities in the Town will be left without a representative until November 1999, when the next regular election is scheduled. Plaintiffs thus apparently believe that, if the upcoming election is held, no special election can be held even if they prevail on appeal. *See* Plaintiffs' Memorandum of Law in Support of Motion for Permanent Injunction at 3.

In deciding whether to enjoin the upcoming election, I am required to "act and rely upon general equitable principles." *Reynolds v. Sims*, 377 U.S. 533, 585, 84 S.Ct. 1362, 1394, 12 L.Ed.2d 506 (1964). Consequently, to prevail on their request for preliminary injunctive relief, plaintiffs must demonstrate that "(1) they will suffer irreparable injury if relief is not granted; (2) there is a substantial likelihood of success on the merits; and (3) the public interest favors issuance of the injunction." *Diaz v. Silver*, 932 F.Supp. 462, 465-66 (E.D.N.Y.1996). In addition, in determining whether a balance of the equities favors the issuance of an injunction, I am "entitled to and should consider the proximity of a forthcoming election." *Reynolds*, 377 U.S. at 585, 84 S.Ct. at 1394. Finally, I note that " 'intervention by the federal courts in state elections has always been a serious business,' not to be lightly

engaged in." *Chisom v. Roemer,* 853 F.2d 1186, 1189 (5th Cir.1988) (citation omitted).

Even defendants concede that if plaintiffs prevail on appeal, there is nothing to prevent a special election to remedy the Section 2 violation.[12] Plaintiffs therefore have failed to establish that irreparable injury will result if I decline to grant the relief they request. In addition, the election plaintiffs ask me to enjoin is, at this point, only three weeks away. I find that the balance of the equities does not support the issuance of an order enjoining the upcoming election. The motion for such an order is therefore denied.

ORDER

In accordance with the foregoing, it is hereby ORDERED that:

(1) The six-district apportionment plan proposed by the Town Board (and described at A-3 through A-10 hereof) satisfies the requirements of the United States Constitution and Section 2 of the Voting Rights Act of 1965 and is hereby adopted;

(2) The defendants, their agents, servants, and employees, and those persons in active concert or participation with them who receive

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[12] *See* Defendants' Memorandum of Law in Opposition to Preliminary Injunction at 6 n. 2 ("Plaintiffs argue that a failure to enjoin the 1997 election would 'delay remedying the Section 2 violation for another two years.' This argument is both unsupported and incorrect.").

actual notice of this order by personal service or otherwise, are each restrained and enjoined:

(a) from using the current at-large apportionment plan for the Town Board of the Town of Hempstead in any future elections;

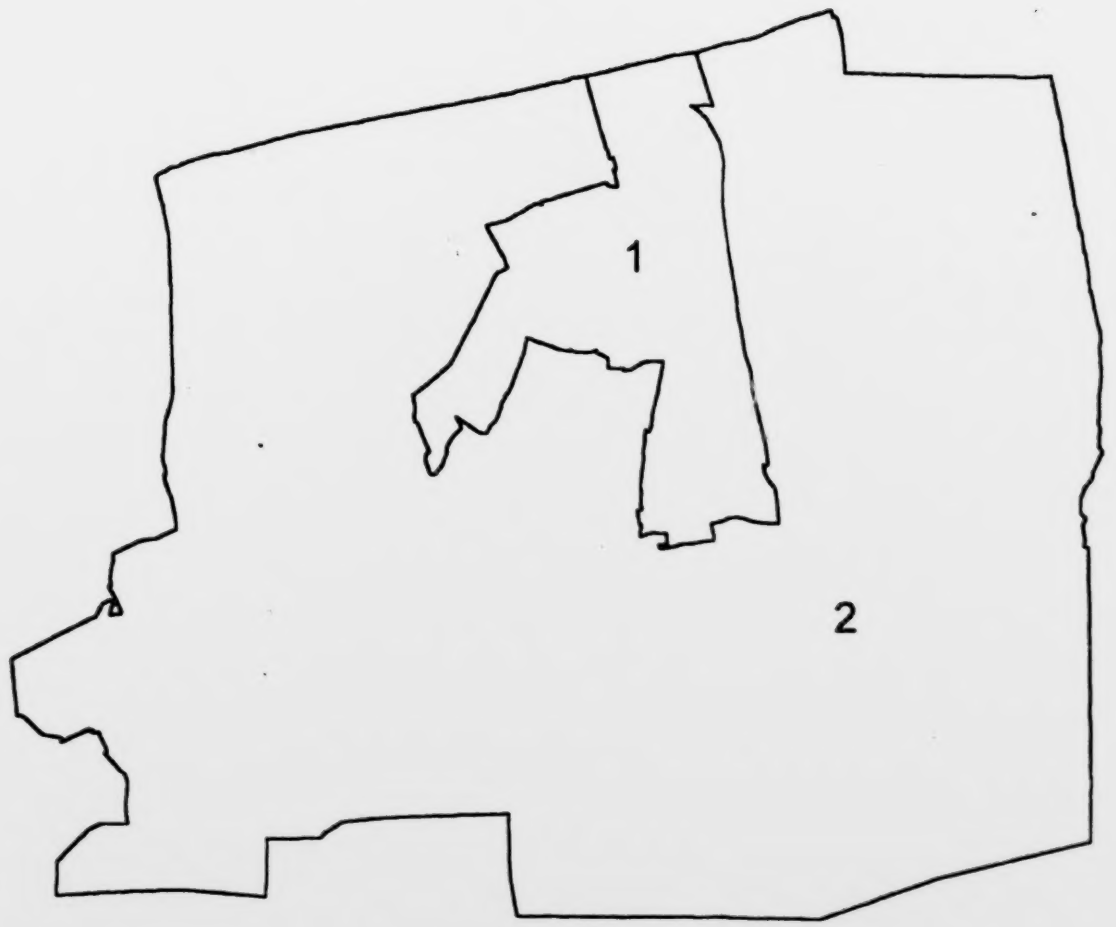
(b) from failing to implement and use the six-district apportionment plan adopted herein; and

(c) from failing to hold a special election under said plan according to a schedule to be determined by the Court at a later time; and

(3) the implementation of the foregoing plan, and the obligations set forth in the section (2) above, are stayed pending appeal.

So Ordered.

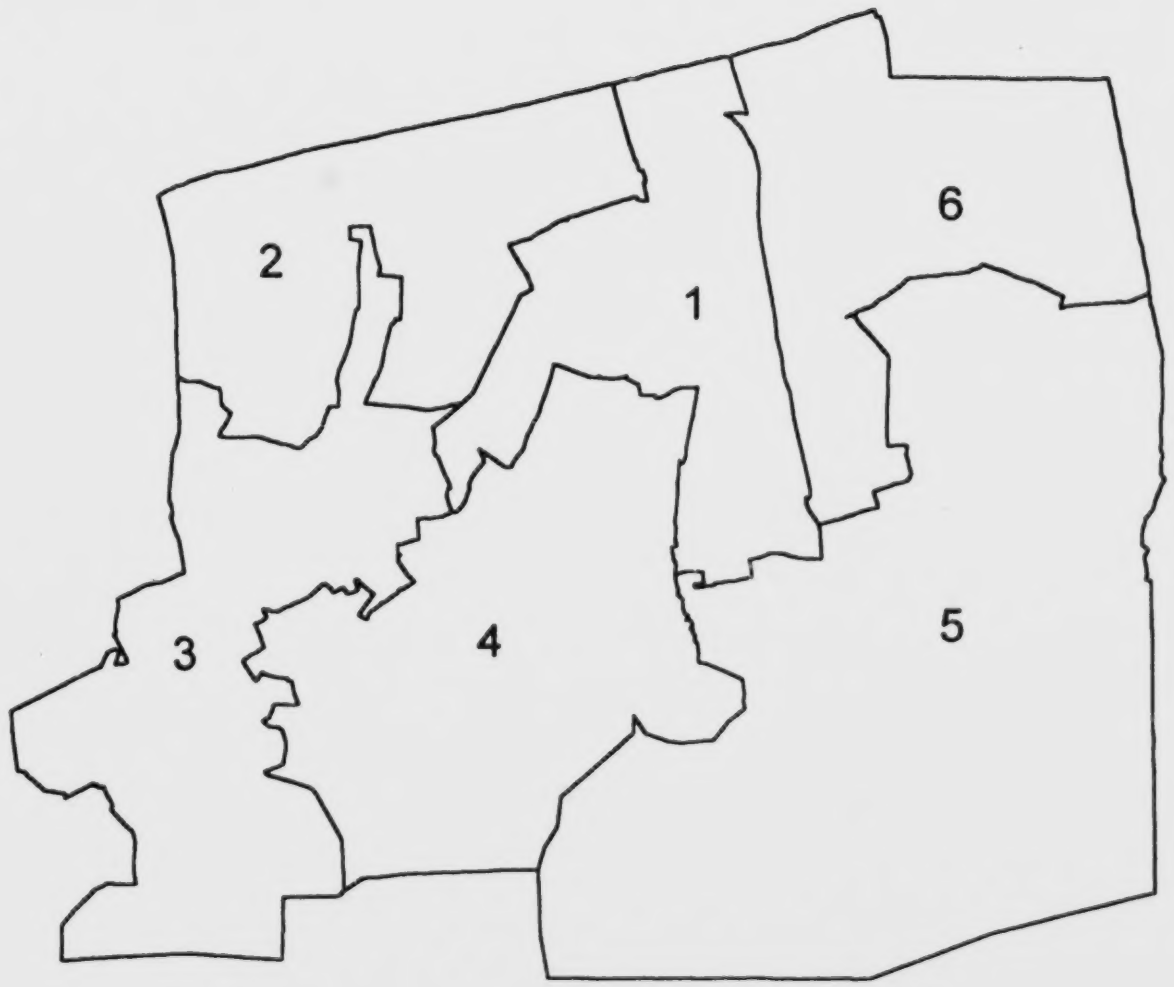
Town of Hempstead
Two District Plan



A-1

Note: Five members are elected from District Two, one from District One.

Town of Hempstead
Six District Plan



A-2

A-3

Six District Plan:

Census Tract and Block Composition of District One

District 1 is composed of the following entire Census tracts:

4062.01, 4062.02, 4067, 4068, 4069, 4070, 4071.01, 4071.02, 4072, 4073.01, 4073.02, 4074.01,4074.02, 4075.01, 4075.02, 4139, 4140.01, 4140.02, 4141, 4142.01, 4142.02, 4143.01

Census tracts 4143.02 and 4144 are divided between Districts 1 and 2.

The following Census blocks are in District 1:

Tract 4143.02

Blocks 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612

Tract 4144

Blocks 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 201, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 399A, 399B, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411

A-4, A-5

Six District Plan:

Census Tract and Block Composition

District Two

District 2 is composed of all Census blocks in the Town of Hempstead in the following Census tracts:

3032.01, 3032.02, 3036, 4043, 4044, 4045, 4046, 4047, 4048, 4049, 4050, 4051, 4052, 4053.02, 4058, 4059, 4060.01, 4060.02, 4061, 4063, 4064, 4065.01, 4065.02, 4066

District 2 is composed of the following Census blocks from split Census tracts:

Tract 4053.01

Blocks 504, 505, 508, 509, 512, 513, 701, 708, 709, 715, 716, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821

Tract 4054

Blocks 206, 209, 210, 211, 212, 213, 214, 215, 216, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 401, 402, 403, 404, 405, 406, 410, 411, 412, 413, 414, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 601, 602, 603, 604, 606, 607, 608, 609, 610, 611, 612, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711

Tract 4055

Blocks 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212

Tract 4056

Blocks 101, 102, 103, 104, 105, 106, 108, 109, 110, 113, 117, 201, 202, 203, 204, 205, 206, 207, 208, 301, 302, 303, 304, 305, 306, 502

Tract 4057

Blocks 101, 102, 103, 104, 105, 106, 107, 108, 201, 202, 203, 204, 205, 206, 207, 208, 209, 301, 302, 303, 304, 305, 306A, 306B, 308, 401, 609

Tract 4098

Blocks 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 401, 402, 403A, 404, 510, 511, 512, 513, 514, 515, 516, 517

Tract 4099

Blocks 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 306, 401, 402, 403, 404, 405, 406, 407, 408, 409

Tract 4100

Blocks 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 401, 402, 403, 404, 405, 406, 407, 408, 409, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510

A-6, A-7

Six District Plan:

Census Tract and Block Composition

District Three

District 3 is composed of all Census blocks in the Town of Hempstead in the following Census tracts:

4101, 4102, 4103, 4104, 4105, 4106, 4107, 4108, 4109, 4110, 4111, 4112, 4113.01, 4113.02, 4114, 4116, 4118, 4163

District 3 is composed of the following Census blocks from split Census tracts:

Tract 4053.01

Blocks 501, 502, 503, 506, 507, 510, 511, 514, 515, 516, 517, 518, 519, 702, 703, 704, 705, 706, 707, 710, 711, 712, 713, 714, 717, 718

Tract 4054

Blocks 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 201, 202, 203, 204, 205, 207, 208

Tract 4055

Blocks 301, 308, 309, 310, 311, 312, 313, 314, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 413, 414, 415, 416, 417, 418, 419, 501, 502, 503, 504, 505, 506, 507, 601, 607, 608, 609, 610, 611, 612

Tract 4056

Blocks 107, 111,112, 114,115, 116, 307, 308, 309, 310, 311, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 501, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514

Tract 4057

Block, 307, 402, 403, 404, 405, 406, 407, 408, 501, 502, 503, 504, 505, 506, 507, 508, 509, 601, 602, 603, 604, 605, 606, 607, 608

Tract 4098

Block 403B

Tract 4099

Blocks 301, 302, 303, 304, 305, 501, 502, 503, 504, 505, 506, 507, 508, 509, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813

Tract 4100

Blocks 101,102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211,212, 213, 214, 215, 216

Tract 4115

Blocks 306, 312, 313, 314, 315, 316, 317, 318A, 318B, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418

Tract 4119.01

Blocks 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 302, 303, 304, 305, 306, 307, 313, 314, 315, 316, 317

Tract 4119.02

Blocks 301, 302, 303, 304, 305, 318, 319, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412,

413, 414, 415, 416, 417, 418, 419, 420, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 513, 514, 516, 517, 518, 519, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614

Tract 4120

Blocks 101, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 508, 509, 510, 511, 512, 513, 514, 515, 516, 518, 519, 520, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 623, 624,

Tract 4121

Block 508

A-8

Six District Plan:

Census Tract and Block Composition

District Four

District 4 is composed of all Census blocks in the Town of Hempstead in the following Census tracts:

4117, 4122, 4123.01, 4123.02, 4124, 4125, 4126, 4127, 4128, 4129, 4130.01, 4130.02, 4131, 4132, 4133, 4134, 4135, 4136, 4137, 4138.01, 4138.02, 4162.01, 4162.02

District 4 is composed of the following Census blocks from split Census tracts:

Tract 4115

Blocks 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119,

120, 121, 122, 123, 124, 125, 126, 201, 202, 203, 204A, 204B, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 301A, 301B, 302, 303, 304, 305, 307, 308, 309, 310, 311

Tract 4119.01

Blocks 101,102, 114, 115, 116

Tract 4119.02

Block 615

Tract 4120

Block 102, 201, 202, 2113, 204, 2115, 206, 207, 208A, 208B, 209, 210, 211, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 401, 402, 403, 414, 415, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 501, 502, 503, 504, 505, 506, 507, 517, 521, 522, 523, 524

Tract 4121

Blocks 101, 102, 103, 104, 105, 106, 107, 108, 109, 111, 112, 113, 114, 115, 116, 117, 118, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 401, 402, 407, 408, 409, 410, 411, 412, 414, 515, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 616, 618, 619, 620, 621, 622, 623

A-9

Six District Plan:

Census Tract and Block Composition

District Five

District 5 is composed of all Census blocks in the Town of Hempstead in the following Census tracts:

4085, 4096, 4097, 4145.01, 4145.02, 4148, 4149, 4151.01, 4151.02, 4152.02, 4153, 4154.01, 4154.02, 4155, 4156, 4157, 4158, 4159, 4160, 4161, 4169

District 5 is composed of the following Census blocks from split Census tracts:

Tract 4143.02

Blocks 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213,301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311,312, 313, 314, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511

Tract 4144

Blocks 501, 502, 503, 504, 505,506,507, 508, 509, 510, 511, 512A, 512B, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 525, 527, 528, 530, 531

Tract 4152.01

Blocks 212, 213, 220, 221, 222, 223, 224, 225, 226, 227, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321,322, 321, 322, 325, 326, 327

A-10

Six District Plan:

Census Tract and Block Composition

District Six

District 6 is composed of all Census blocks in the Town of Hempstead i the following Census tracts:

4076, 4077, 4078.01, 4078.02, 4079, 4080, 4081, 4082, 4083, 4084, 4086, 4087, 4088, 4089, 4090, 4091, 4092, 4093, 4094, 4095, 4146, 4147, 4150

District 6 is composed of the following Census blocks from split Census tracts:

Tract 4152.01

Blocks 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 117, 118, 119, 120, 121, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 214, 215, 216, 217, 218, 219

U.S. COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

KAREN GREVE MILTON
ACTING CLERK

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 8th day of September, one thousand nine hundred and ninety nine.

Dorothy Goosby,

Plaintiff-Appellee, *Docket No. 97-7403*

v.

Town Board of the Town of Hempstead,

Defendant-Appellant.

(Filed Sep. 8, 1999)

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is ***DENIED****.*

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active

service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
KAREN GREVE MILTON,
Acting Clerk

By: /s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

---

42 USCS § 1973 (1999)

§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [*42 USCS § 1973b*(f)(2)], as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(2)

No. 99-886

Supreme Court, U.S.
FILED
DEC 27 1999
CLERK

IN THE

Supreme Court of the United States

TOWN BOARD OF THE TOWN OF HEMPSTEAD, NEW YORK, *et al.*,

Petitioners,

v.

DOROTHY GOOSBY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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4/3pp

COUNTER-QUESTIONS PRESENTED

After hearing 11 days of testimony and reviewing hundreds of pages of exhibits, District Court Judge John Gleeson issued a 65-page decision in which he stated:

> In evaluating all of the relevant facts as a whole, including the size of the Town, the absence of geographic subdistricts, the lack of access by blacks to the Republican Party slating process, the unfortunate use of racial appeals in political campaigns, the lack of responsiveness by the Town Board to the particularized needs of the black communities, and the stated desire by the Town government to cling to a monolithic, single-voice legislature for a heterogenous population consisting of many different communities and voices, I conclude that the black citizens' failure to elect representatives of their choice to the Town Board is not best explained by partisan politics. Rather, black citizens' inability to elect their preferred candidates is best explained by the fact that the political processes leading to elections and the slating of candidates for them are not equally open to the participation of blacks.
>
> * * *
>
> Having conducted the careful and searching appraisal mandated by Section 2 [of the Voting Rights Act], I have a definite and firm conviction that the at-large scheme employed for Town Board elections in Hempstead has operated to invidiously exclude blacks from effective

> participation in political life in violation of Section 2 [of the Voting Rights Act].

(Pet. 129a-132a).[1]

As a remedy, Judge Gleeson directed the Town be divided into six council manic districts, one of which would have a black voter majority (Pet. 132a).

The questions presented are:

1. Did the district court properly apply the tests enunciated in *Thornburg v. Gingles*, 478 U.S. 30 (1986), in its assessment of the evidence of white bloc voting and the evidence of partisanship?

2. Were the district court's factual findings of "legally significant white bloc voting" and of "vote dilution" clearly erroneous?

3. Did the district court properly reject, as unconstitutional, Petitioners' alternative remedial plan which proposed dividing the Town of Hempstead into one "white" district which would elect five Town Board members and one "black" district which would elect one Town Board member?

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1. Numbers preceded by "A" refer to page numbers in the Joint Appendix. Numbers preceded by "T" refer to page numbers in the trial transcript. Numbers preceded by "E" refer to trial exhibits. Numbers preceded by "Pet." refer to pages of Petitioners' Petition for a Writ of Certiorari.

TABLE OF CONTENTS

	Page
Counter-Questions Presented	i
Table of Contents	iii
Table of Cited Authorities	vi
Table of Appendices	viii
Legislative History Involved	1
Counter-Statement Of The Case	1
A. The Nature Of The Case And The Evidence At Trial.	2
B. The District Court's Liability Findings Of Fact.	4
1. The *Gingles*' Preconditions.	4
a. The First *Gingles* Precondition: A Sufficiently Large And Geographically Compact Minority Group.	4
b. The Second *Gingles* Precondition: Political Cohesion Of The Minority Group.	5
c. The Third *Gingles*' Precondition: Legally Significant White Bloc Voting.	5

Contents

		Page
2.	The Totality Of Circumstances And The Senate Report Factors.	6
	a. Access to the Candidate Slating Process.	6
	b. Racial Appeals in Campaigning. ..	8
	c. Responsiveness by Elected Officials To Minority Needs.	12
	d. History Of Official Discrimination.	14
	e. Electoral Mechanisms That Enhance Vote Dilution.	15
	f. Minorities Elected to Public Office.	16
	g. Tenuousness Of The Policy Underlying At-Large Elections. ..	16
	h. Political Partisanship.	17
C.	The District Court's Remedial Decision. ..	18

Contents

	Page
Reasons for Denying the Writ	20
I. The Clearly-Erroneous Standard Governs This Court's Review of The District Court's Factual Findings of Legally Significant White Bloc Voting And Minority Vote Dilution. .	21
II. The District Court Properly Evaluated The Alleged Impact of Partisanship in The Totality of The Circumstances, And Its Finding That Black Citizens' Inability to Elect Their Preferred Candidates Is Best Explained by The Fact That The Political Processes Leading to Elections And The Slating of Candidates Are Not Equally Open Is Amply Supported by The Record.	22
III. The District Court Properly Found That Petitioners' Two-District Remedy Violated The Fourteenth Amendment.	28
Conclusion	30

TABLE OF CITED AUTHORITIES

Page

Cases:

Bush v. Vera, 116 S. Ct. 1941 (1996) 19, 28

Johnson v. DeGrandy, 512 U.S. 997 (1994) 23

League of United Latin American Citizens, Council No. 4434 v. Clements, 999 F.2d 831 (5th Cir. 1993), *cert. denied*, 510 U.S. 1071 (1994) 26, 27

Miller v. Johnson, 115 S. Ct. 2475 (1995) 19

NAACP v. Nassau County Board of Elections, CV 90-0306 (E.D.N.Y. 1990) (Sifton) 15

Sanchez v. State of Colorado, 97 F.3d 1303 (10th Cir. 1996) 25

Shaw v. Hunt, 116 S. Ct. 1894 (1996) 19

Shaw v. Reno, 509 U.S. 630 (1993) 19, 27, 28

Thornburg v. Gingles, 478 U.S. 30, 106 S. Ct. 2781 (1986) ..... ii, 1, 4, 5, 20, 21, 22, 23, 24

Whitcomb v. Chavis, 403 U.S. 124 (1971) 27

White v. Regester, 412 U.S. 755, 93 S. Ct. 2332 (1973) 21

Cited Authorities

Page

Statute:

42 U.S.C. § 1973(b) 1, 15, 16, 18, 23, 29

United States Constitution:

U.S. Const. amend. XIV 27

Rule:

Fed. R. Civ. Proc. 52(a) 21

Other Authorities:

New York Election Law Section 5-406 15

S. Rep. No. 417, 97th Cong., 2d Sess. (1982), *reprinted in* 1982 U.S.C.C.A.N. 177 .... 1, 6, 9, 12, 13, 15, 16, 17

TABLE OF APPENDICES

Page

Appendix — Excerpts From The May 1982 Senate Judiciary Committee Report On The Voting Rights Act Amendments Of 1982 (S. Rep. No. 417, 97th Cong., 2d Sess., At 28-30 [1982]) 1a

LEGISLATIVE HISTORY INVOLVED

Missing from Petitioners' certiorari petition is citation to the Senate Judiciary Committee Report accompanying the 1982 amendments to Section 2 of the Voting Rights Act. *See* S. Rep. No. 417, 97th Cong., 2d Sess., at 28-30 (1982). In *Thornburg v. Gingles*, 478 U.S. 30, 43 (1986) (citations and internal quotes omitted), this Court observed that, "[t]he Senate Report which accompanied the 1982 amendments elaborates on the nature of § 2 violations and on the proof required to establish these violations." Throughout this Court's analysis of the district court's decision in *Gingles* it repeatedly referred to and relied on the accompanying Senate Report factors and *rejected* the government's argument that "little weight" should be given to the Senate Report. *See* 478 U.S. at 43, n.7. The factors contained in the Senate Report are provided in the Appendix to this Brief at 1a.

COUNTER-STATEMENT OF THE CASE

Petitioners seek to convince this Court that their appeal somehow presents a legal issue over which there is disagreement amongst the Circuit Courts. They fashion this argument by ignoring the fact intensive, functional inquiry necessarily conducted by the District Court in concluding that the challenged at-large electoral system diluted Respondents' rights in violation of § 2 of the Voting Rights Act, and, attempting to evade the "clearly erroneous" test governing appellate review of that conclusion (*see Gingles*, 478 U.S. at 78-80). Because Petitioners have all but obfuscated the District Court's carefully detailed and fully supported findings and because those findings decisively annihilate Petitioners' underlying representation to this Court that partisan affiliation, as opposed to race, caused blacks to be excluded from effective political participation in Hempstead, we provide a comprehensive explication of those findings.

A. The Nature Of The Case And The Evidence At Trial.

Respondents, a certified class of all registered black voters in the Town of Hempstead, brought this action maintaining that the at-large voting system for membership on the Town Board diluted and submerged their votes into the larger white community, thereby assuring continued lack of representation (A22). Petitioner Town Board is the legislative body for the Town of Hempstead which has 2,400 employees and an annual budget of $290 million (T1445). The Town Board's responsibilities include zoning, parks and recreation, planning and economic development, sanitation, road maintenance, street lights, water supply, tax collection, environmental conservation, building code violations, public safety, senior citizens services and occupational resources (T1295-1314). Its numerous departments include the Public Safety Department, the Department of Sanitation, the Department of Water, the Department of Parks and Recreation, the Department of Senior Enrichment, the Department of Planning and Economic Development, the Department of General Services, the Department of Highways, the Department of Industry and Commerce, the Department of Conservation and Waterways, the Department of Occupational Resources, and the Department of Buildings (Pet. 67a).

The 1990 census showed the Town had a total population of 725,639 (12.1 percent black and 83 percent white). (Pet. 64a). Yet, from 1907 to 1993, no black candidate has ever been elected to the Town Board (Pet. 98a) and that 1993 candidate was not the candidate of choice of the black community (Pet. 80a).

The trial was held before Judge Gleeson and proceeded for 11 full trial days (2,116 pages of trial transcript). Three experts and 14 fact witnesses testified for Respondents and one expert and six fact witnesses testified for Petitioners.[2] Closing arguments lasted an entire day (T1974-2116).

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2. Respondents' fact witnesses were: Samuel Prioleau (T45-67) (black Democrat, former school teacher, and community activist); David

(Cont'd)

(Cont'd)
Ford (T545-83) (former black Republican and Democratic candidate for Hempstead Town Board); Lance D. Clark (T623-50) (black Republican, Deputy Mayor for the Village of Hempstead, Republican committeeman); Earlwin Warren (T666-97) (black Republican, former Republican committeeman, Town of Hempstead employee and victim of racial discrimination in employment); Andrew Hardwick (T707-30) (black Republican, former candidate for the 18th Assembly District located in the Town of Hempstead); Peter LeMonier (T740-82) (black Republican, Republican Executive Leader from Lakeview, Deputy Commissioner for the Town Parks and Recreation Department, member of African-American Republican Coalition ["AARC"]); Barry DelMastro (T796-839) (white Democrat, former Hempstead Town Democratic Chair, Democratic candidate for Hempstead Town Board); John Matthews (T879-908) (white Democrat, former Chair of Nassau County Democratic Committee, former Commissioner of Nassau County Board of Elections, former Democratic candidate for Congress in the 5th Congressional District); Diana Coleman (T953-83) (black Democrat, community activist, Chair of Roosevelt Community Service Program); Melvin Boone (T996-1013) (black Republican, Nassau County Police Department detective); San Salvadore Bloomfield (T1027-57) (former black Republican, Town employee, and successful plaintiff in federal employment discrimination case against the Town of Hempstead); Hazel N. Dukes (T1057-78) (black Democrat, President of New York State Conference of the NAACP); Vivien DeJong (T1090-1118) (white Democrat, former candidate for Town Board); and Betty McAllister (T1952-67) (black Republican, community activist).

Petitioners' fact witnesses were: Robert Francis (T1168-1216) (black Republican, Commissioner, Department of Planning and Economic Development in the Town of Hempstead, Republican Executive Leader from Roosevelt, member, African-American Republican Coalition); Gregory Peterson (T1287-1355) (white Republican, Supervisor, Town of Hempstead, Republican Executive Leader, East Meadow); Kendall W. Lampkin (T1465-85) (black Republican, Executive Assistant to the Supervisor, Town of Hempstead); Briding Newell (T1652-66) (black Republican, Senior Research Analyst, Nassau County Legislature, former Commissioner, Town of Hempstead Department of Drug & Alcohol); Curtis Fisher (T1743-79) (black Republican, Town Board member, former Executive Assistant to the Town Board of the Town of Hempstead); and Honorable Alfred Robbins (T1896-1918) (black Republican, retired New York State Supreme Court Justice, County of Nassau).

B. The District Court's Liability Findings Of Fact.

Following *Gingles*, Judge Gleeson found (Pet. 57a-134a) that Respondents had met their burden of proof with respect to the three *Gingles* preconditions. As recited by this Court:

> First, the plaintiffs must show that the minority group is sufficiently large and geographically concentrated such that it could constitute a majority in a single-member district. Second, the minority group must show that it is politically cohesive. Third, the plaintiffs must demonstrate that the "white majority votes sufficiently as a bloc to enable it — in the absence of special circumstances . . . — usually to defeat the minority's preferred candidate."

Gingles, 478 U.S. at 50-51.

1. The *Gingles*' Preconditions.

a. The First *Gingles* Precondition: A Sufficiently Large And Geographically Compact Minority Group.

Judge Gleeson found and it is undisputed that the black community in the Town is sufficiently large and geographically compact such that it could constitute a majority in a single-member district (Pet. 110a-112a). Dr. Andrew Beveridge, Respondent's expert in the field of districting, prepared a map containing six single-member districts and demonstrated that it was possible to create one majority black district in the Town of Hempstead (Pet. 68a-69a, 133a). He was able to draw a single-member district plan adhering to the one person-one vote standard, equal population size, compactness, preservation of political geography and, as a subordinate consideration, the creation of a majority-minority district (Pet. 68a-69a). He was able to attain fairly equivalent populations among districts, the ideal population size per district being 120,000 (Pet. 68a-69a; T154).

b. The Second *Gingles* Precondition: Political Cohesion Of The Minority Group.

Judge Gleeson found, and the Town conceded (Pet. 116a), that "[t]here is no dispute that the black voters in the Town are politically cohesive" and that blacks in the proposed majority-minority district have the potential to elect their preferred candidate (Pet. 72a). Both parties' racial bloc voting experts concluded that there was a persistent pattern of racially polarized voting in elections for the Town Board and that African-American voters voted cohesively (T357-59; A1500-1501; A1516-17). In all seven Town Board elections from 1983 through 1993 blacks and whites voted for different candidates (T350-55; E86; E87).

c. The Third *Gingles'* Precondition: Legally Significant White Bloc Voting.

Judge Gleeson found that Respondents had established "legally significant white bloc voting" by virtue of the fact that the white majority in Town voted sufficiently as a bloc to enable it to always defeat the minority preferred candidate (Pet. 116a-118a). Each of the analyzed Town Board elections exhibited racially polarized voting (Pet. 78a-80a) and in every Town Board election from 1983 through 1993, the white voting majority did not prefer any candidate who was among the preferred candidates of black voters (T337-359, T1500-1501, T1516-17, T1565). Black voters had never been able to elect their preferred candidate to the Town Board (T340-41; E79).

In every election for Town Board, the majority of white voters withheld their votes from the minority-preferred candidate. The district court also observed that every minority-preferred candidate for Town Board lost to the majority preferred candidate as a result of white voters voting for candidates the black voters did not support. *Id.* The court concluded that "there is a persistent pattern of racially polarized voting in Town Board elections that consistently has resulted (and will result in the future) in the defeat of the minority-preferred candidate" (Pet. 118a).

While Petitioners did not seriously contest the existence of racial polarization in voting patterns (Pet. 82a), they maintained that the racial polarization in the election results lacked "legal significance" because of the existence of partisan polarization in the elections. The district court determined that the inquiry into this issue was properly to be performed in its totality of circumstances analysis (Pet. 128a).

2. The Totality Of Circumstances And The Senate Report Factors.

a. Access to the Candidate Slating Process.[3]

The court found that blacks had been denied access to the Republican Party slating process for Town Board elections (Pet. 89a, 92a-93a). It noted that there existed a formal procedure for selecting Republican candidates for Town Board and other elective offices; the county chair would recommend a candidate to the executive committee, consisting of the executive leaders of the party, which would vote on whether to recommend that individual to the party's convention, and the convention would then vote on the recommendation (Pet. 87a). However, the court found, the executive committee always and unanimously recommends the county chairman's selection to the convention, which *always* and *unanimously* accepts those recommendations (Pet. 87a).[4] There has never been a party primary for a nomination to the Town Board and for nearly a century, every Town Board member has been a Republican (Pet. 86a).

3. The Senate Report identified the following as probative of a Section 2 Violation: If there is a candidate slating process, whether members of the minority group have been denied access to that process. S. Rep. at 29, 1982 U.S.C.C.A.N. at 206.

4. Bruce A. Blakeman, then Town Board member whose affidavit was placed in the record by Petitioners, could not recall a single instance where more than one individual was nominated for an elective office at a convention (E232-33). Similarly, Patrick A. Zagarino, a member of the Town Board, and a defendant in this case, stated that he could not recall a single instance when the executive committee of the Republican Party of the Town voted in favor of an individual for town office and that individual did not receive the vote of the convention (E261).

The Republican Party had acceded to the desire of prominent black Republicans, notably the Nassau County African-American Republican Coalition ("AARC"), to have blacks nominated as candidates for seats in mainly majority-minority districts, such as in the 18th A.D., or judicial districts (A1076). However, the court found that the Town Board and the Republican party had *not* been as receptive to the idea that a black should occupy a seat on the Town Board (Pet. 89a).[5] With the sole exception of Curtis Fisher, the Republican party has never nominated a black person for Town Board (Pet. 89a).

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5. Town Board Supervisor Peterson, a defendant in this case, testified that when vacancies arose on the Board in 1989, certain black Republican leaders had not asked that an African-American be appointed to those positions (T1406-1407). However, members of the African-American community had protested and marched on Town Hall seeking representation at that time (T1400-1401). Peterson stated that he believed there were qualified African-Americans for those positions (T1401-02).

Briding Newell, Petitioner's witness, an African-American involved in AARC and an executive assistant from 1983-1989 to the Town Board's Supervisor, testified that she was never asked by the Republican Party to run for the Town Board (T1670). Newell stated that AARC had lobbied intensely for African-American representation from 1983 to the time Fisher was nominated to the Board (T1684). However, in 1993 when a vacancy arose, AARC did not support Fisher's nomination. Newell testified that Lance Clark was their choice because of his years of involvement in the party contrasted with that of Fisher (T1668-1669).

Robert Francis, an African-American Executive Leader in Roosevelt, a member of the Coalition and also a witness for Petitioners, testified that years prior to Fisher's appointment he had sought the support of Joseph Mondello, the party Chairman, and then Town Supervisor, in order to get African-American representation on the Board (T1204-1205). Nevertheless, Francis stated that AARC had never recommended an individual for a position on the Town Board prior to Lance Clark (T1204). Upon examination by the court, Francis agreed that when Mondello designated a candidate for the Board it was just assumed that person would be elected (T1204).

The court observed that in 1987, two vacancies arose on the Board and two whites were appointed to fill those vacancies (Pet. 89a). In 1989, two more vacancies arose. Blacks, including members of AARC, marched on Town Hall to pressure the party leaders to nominate a black Republican. Despite these efforts, once again two whites were nominated to fill those vacancies (Pet. 89a). At the time of these appointments, Joseph Mondello, the Republican Party chairman who had control over the nomination process, was also the Presiding Supervisor of the Town (Pet. 89a).

In 1993, another vacancy arose on the Board. AARC recommended Lance Clark, a black attorney who was Deputy Mayor of the Village of Hempstead, a Republican committeeman in the Village for 14 years and an active member in the black community (Pet. 90a). However, Clark was not even interviewed for the position (Pet. 90a). Instead, Mondello nominated his tennis partner, Curtis Fisher, who did not live in any of the black communities in the Town (Pet. 90a). Fisher had been considered by AARC, but had been found less qualified to represent the black community (Pet. 91a).

Based on these facts, the court found that the slating process for Town Board used by the Republican Party was not truly open to blacks, noting that when the Republican Party had the opportunity to nominate a minority-preferred Republican candidate, the party leader chose to ignore the recommendation of prominent black Republicans and handpick a "safe" black Republican (Pet. 93a). In reaching the conclusion that Fisher was a "safe" candidate, Judge Gleeson had the opportunity to evaluate Fisher's testimony, including his demeanor, his candor or lack of candor, his self-interest, and his overall credibility.

b. Racial Appeals in Campaigning.[6]

Judge Gleeson found that there "was a pattern of Republican campaign materials that were characterized by subtle racial

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6. The Senate Report identified the following factor as probative of a Section 2 Violation: Whether political campaigns have been (Cont'd)

appeals, which sought to depict the integration of white areas as a threat, and to prey on the fear of such a threat" (Pet. 97a-98a). Petitioners completely ignore this finding, maintaining in their Petition that "[t]he election results for Council members unequivocally demonstrate that race plays no role in the election of candidates to the Board." App. 2.

As John Matthews, a white Democrat, former Chair of the Nassau County Democratic Committee, and former Commissioner of the Nassau County Board of Elections, testified:

> Q. Now, with respect to the town elections or elections within the town, to what do you attribute the loss of [races by] Democrats?
>
> * * *
>
> A. I thought that over the years there was a, what's to be [sic] racist undertones to the campaign that the Republican Party ran against the Democratic Party in the Town of Hempstead.
>
> Q. What do you mean by racial overtones or undertones?
>
> A. Undertones. It always seemed to me that the Republican Party preyed on the fears of white people. It seemed that the literature that I remembered, vacant dumps and vacant lots with garbage strewn on it with phrases such as don't let New York City come to Nassau County, don't citify Nassau County, keep the city out of our county, and those were the campaigns year in and year out which has an undercurrent of what we call playing the race card (T891-92).

Matthews responded, as follows, when asked whether race played a role in party politics in the Town:

(Cont'd)
characterized by overt or subtle racial appeals. S. Rep. at 29, 1982 U.S.C.C.A.N. at 206.

I think that race has a great deal to do with party politics in Nassau County. The Democratic Party is perceived to be a party of liberal Jews and Blacks and the Republican Party is perceived to be a party of christians, Italians and Irish . . . (T897).[7]

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7. Additional testimony on the pattern of racial appeals by Republicans came from Barry DelMastro, a white Democrat, former Republican, former Hempstead Town Democratic Chair, and candidate for Town Board, who testified as follows:

Q. Have you ever heard the phrase keep the suburb[s] the suburb[s]?

A. Yes, I have.

Q. Have you heard it used in election campaigns?

A. Yes.

* * *

Q. From your recollection of hearing the phrase, who has used it, Democrats or Republicans?

* * *

A. Always Republican.

* * *

Q. What impressions did you draw from the phrase keep the suburbs the suburbs?

A. Let's keep everything status quo and let's keep the neighborhoods white.

* * *

Q. You also used the term playing the race card?

A. Yes, sir.

* * *

Q. What does playing the race card mean to you?

A. Playing the race card is invoking fear in the hearts and minds of voters that if you wind up voting for the opposition that you'll see significant number of either African Americans coming in or they'll be bused into your schools or something to that effect that would try to evoke the fear in somebody's heart and mind that vote — for them to vote for that particular individual or that group of people.

Yet another example of the use of racial appeals was the campaign literature used by incumbent Republican state senator Skelos from the Town in his campaign during the 1970s. The court found that Skelos had appealed to the fears of Town residents that black students from Queens would be bused to schools in the Town, using campaign literature which included photographs of black children in school buses. The court concluded that the intent of this literature was to convey the message to Town voters that a vote for a Democratic candidate would result in busing of school children for integration purposes (Pet. 95a).[8]

Additionally, the court concluded that a Town Board member, Joseph Cairo, used campaign literature that sought to appeal to anti-black sentiments and to play on the fears of certain Town residents about the influx of black residents from Queens into the Town (Pet. 95a-96a; E.332-335). In his literature Cairo claimed to be the unofficial liaison to the Nassau County Police Department, and that he had sensitized local patrolmen to the "special needs" of the community (Pet. 96a-97a). On this issue, the court credited the testimony of Melvin Boone, a Republican and detective in the Nassau County Police Department. Detective Boone testified to a practice in the Department whereby patrol officers were to keep Queens blacks out of the border neighborhoods, and that border patrols were conducted (Pet. 96a-97a). The court concluded that Cairo's campaign

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8. In this regard, DelMastro testified as follows:

> Over time I've seen one particular instance down in the Five Towns area I know when Carol Berman was running for reelection for state senate that there were pictures of school buses, drawings of school buses with black children in that particular campaign literature.
>
> Q. What impressions did you see seeing black children in those school buses?
>
> A. That Republicans were trying to say if you vote for this Democrat that you will wind up having black children bused in from Queens (A871-72).

literature was perceived, reasonably, as a promise to stem the tide of blacks across the Queens border into Elmont and North Valley Stream (Pet. 97a-98a).[9] The court further found that "the Town Board — perhaps through Cairo himself — used its unofficial influence over the police department to further this goal" (Pet. 97a). Cairo did not testify at the trial.

c. Responsiveness by Elected Officials To Minority Needs.[10]

The district court concluded that the Town Board is unresponsive to the particularized needs of the black

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9. DelMastro testified concerning the phrases used in Cairo's campaign literature, as follows:

> Q. I would like you to read the paragraph that follows. I quote, "Joe Cairo is well aware of his community's proximity to the City of New York. The location is an ideal one but it also puts the area at risk of urbanization. Accordingly, Councilman Cairo has been a major opponent of those who seek to 'Queensify' North Valley Stream and its environs."
>
> What impressions, if any, did you get from these various statement I read to you?
>
> A. Here again, I think it is somewhat beyond subtle and I think pretty much it is coming out and saying we are going to stop those people from moving in.
>
> Q. You say "those people"?
>
> A. Those people. Those people of color from moving in.

During the period of time when Cairo used this literature containing racial appeals, black residents from Queens were moving into the formerly predominantly white sections of Elmont and North Valley Stream (Pet. 96a). This influx resulted in racial tensions in the Town (*Id.*).

10. An additional factor found by the Senate Judiciary Committee to have probative value was whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group. S. Rep. at 29, 1982 U.S.C.C.A.N. at 207. The Senate Report observed that:

(Cont'd)

communities in the Town (Pet. 99a). Although then Town Supervisor Peterson testified that the Town had an affirmative action policy, in fact, there was no such policy in place (Pet. 100a). Instead there was only a policy against overt racial animus (Pet. 100a; T1449-51; T1889-90). Fisher, who had been the affirmative action officer for the Town, had received no training for that position and was not familiar with anti-discrimination laws (Pet. 100a-101a).

In finding that the anti-racial slur policy was itself not taken seriously by the Town Board, the court relied on the testimony of Earlwin Warren and San Salvadore Bloomfield, both African-Americans. Warren, a Republican committee member in the Town who worked actively for the party and was employed in the Town's Department of Sanitation, testified about how he had been mistreated with respect to work assignments and the use of racial epithets and other verbal abuse.

Although Fisher concluded that Warren had been subjected to racial discrimination in the Department, including being called a "nigger" by a Town co-worker in a Town workplace, he never bothered to explore discipline of the offending employee (Pet. 101a). Additionally, there was no sensitivity training instituted for Department employees, Fisher never made any report to the Board regarding this incident, and Warren was prevented from concluding his remarks when he tried to directly raise this issue with the Board. *Id.*

Bloomfield, a member of the Uniondale Republican club and a master carpenter hired by the Town as a seasonal laborer, complained to then Affirmative Action Officer Fisher that he

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(Cont'd)

> Unresponsiveness is not an essential part of plaintiff's case. . . . Therefore, defendant's proof of some responsiveness would not negate plaintiff's showing by other, more objective factors enumerated here that minority voters nevertheless were shut out of equal access to the political process.

S. Rep. at 29, n.116, 1982 U.S.C.C.A.N. at 207, n.116.

was unjustifiably passed over for appointment and promotion by two less qualified whites. Fisher spoke to the Town's Personnel Director, but advised Bloomfield that there was nothing he could do about the problem (Pet. 102a). Even after Bloomfield won a judgment against the Town in connection with this matter, the Board took no action, and declined to provide any sensitivity training to Town employees in that department (Pet. 102a).

The court found other examples of a lack of responsiveness in that the African-American residents of Lakeview and Uniondale, and the black community in Elmont had all been denied funding for community centers (Pet. 103a), the commercial center of Roosevelt, a predominantly black area, had been allowed to deteriorate without any recommendations from Fisher (Pet. 103a-104a), and the Town took no action upon learning that a trophy on display in the Freeport Volunteer Fire Department bore the inscription of the Ku Klux Klan (Pet. 102a).

Based on the evidence in the record, the court was of the opinion that Petitioners had

> established indifference and callousness on the part of the Town Board with respect to the issue that probably matters most to blacks: racial intolerance and bigotry in Town government itself. It is a government that, in all seriousness regards a prohibition against overt racial animus as affirmative action, and even when such animus is brought to its attention, takes no action at all

(Pet. 105a).

d. History Of Official Discrimination.[11]

Judge Gleeson concluded that there was no official policy of discrimination against blacks in the Town (Pet. 82a), however,

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11. In the Senate Judiciary Committee Report the following factor was identified as probative of a Section 2 violation: The extent of *any* history of official discrimination *in* the state or political subdivision (Cont'd)

he found that the purging of voters from the voting rolls of Nassau County[12] (in which Hempstead is located) had a discriminatory impact on black voters and was an appropriate consideration in evaluating the totality of circumstances (Pet. 83a). The affidavit of Dr. Alan Lichtman (T419-21) demonstrated that African-American registrants in Assembly District 18, which is virtually geographically identical to Respondents' proposed majority-minority district (E6), were more than twice as likely to be purged as white registrants in that district (E13-14). Furthermore, there was a higher rate of purge in minority districts than in white districts (E15).

e. Electoral Mechanisms That Enhance Vote Dilution.[13]

Judge Gleeson found that the unusually large size of the Town and the prohibition against cumulative voting significantly reduced the chances of minority electoral success (Pet. 85a-86a). The size of the Town made campaigning a daunting prospect according to both black Republicans and black and white

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that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process. S. Rep. No. 417, 97th Cong., 2d Sess., at 28 (1982) (footnotes omitted) ("S. Rep."), *reprinted in* 1982 U.S.C.C.A.N. 177, 206 (emphasis added).

12. Under Section 5-406 of the New York Election Law, voters who had failed to vote for four successive years were purged from the rolls. The purging of voters in Nassau County continued until 1990 when in *NAACP v. Nassau County Board of Elections*, CV 90-0306 (Sifton), the Eastern District Court of New York issued a restraining order preventing the defendants therein from continuing to purge voters in Nassau County because of the disparate racial impact of the purge (E289-90; Pet. 84a).

13. The Senate Report identified the following factor as probative of a Section 2 violation: The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group. S. Rep. at 29, 1982 U.S.C.C.A.N. at 206.

Democrats who testified at the trial (A1074). The court also found that the difficulties faced by black candidates in Town-wide elections contrasted sharply with their ability to achieve electoral success in smaller districts, such as the 18th A.D. and the Nassau County legislative districts (Pet. 86a).

f. Minorities Elected to Public Office.

With the exception of the nomination and election of Fisher to Town Board, all of the other members of the Board from 1907 to 1993 were white Republicans (Pet. 98a). Blacks had been appointed or elected to judicial positions, had served in governmental positions in the majority-minority villages of Hempstead and Freeport, and as commissioners in Town government; however, the court was critically moved by the fact that "until the election of Curtis Fisher in 1993, no African-American was ever elected to the legislative body at issue in this case" (Pet. 98a-99a).[14] The court agreed with Respondents that Fisher was selected because he was a "safe" minority candidate (Pet. 99a).[15]

g. Tenuousness Of The Policy Underlying At-Large Elections.[16]

The court determined that the "policy" underlying the at-large voting structure was weak and weighed in favor of

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14. In the Senate Judiciary Committee Report the following factor was identified as probative of a Section 2 violation: the extent to which members of the minority group have been elected to office. S. Rep. at 29, 1982 U.S.C.C.A.N. at 207.

15. The Senate Report acknowledged that white citizens might seek to evade the reach of Section 2 by manipulating the election of a safe minority candidate. S. Rep. at 29, n.115, 1982 U.S.C.C.A.N. at 207, n.115.

16. An additional factor found by the Senate to have probative value with respect to a plaintiff's evidence of a violation is: whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice, or procedure is tenuous. S. Rep. at 29, 1982 U.S.C.C.A.N. at 207. The Senate Report observed that "even a consistently applied practice

(Cont'd)

Respondents. It specifically rejected Petitioners' argument that an at-large elected body represents everyone in the Town. In fact, the evidence revealed that the Town was so large that the Board had already created *de facto* districts, assigning primary responsibility for areas in the Town to particular Board members (Pet. 108a). The court was of the opinion that this *de facto* districting undermined the Petitioners' arguments and demonstrated that the Town was too big and diverse for its governing body to be elected at-large (Pet. 108a).

h. Political Partisanship.

The district court noted that while Petitioners did not seriously contest the existence of racial polarization in voting patterns (Pet. 82a), they contended that the racial polarization in the election results lacked "legal significance" because of the existence of partisan polarization in the elections. *Id.*

The evidence from both parties' experts showed that there was a form of partisanship polarization in the Town elections studied; black voters support Democrats and white voters support Republicans. *See* McDonald (T351, T384, T413); Stanley (T1516-1517). However, both experts agreed that the presence of partisanship polarization did not negate the fact that racially polarized voting patterns also existed.

The court concluded that there was a strong correlation between political partisanship and the voting behavior of blacks and whites in the Town (Pet. 129a). However, it reasoned that "[i]t is possible for race-neutral factors, such as political partisanship, to co-exist with race-based ones, such as diminished access to the slating process or insensitivity by elected officials to the particularized needs of the minority community." *Id.* It explained that the fact that "divergent voting patterns may be logically explained by a factor other than race

(Cont'd)

premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process." S. Rep. at 29, n.117, 1982 U.S.C.C.A.N. at 207, n.117.

does not end the inquiry, nor does it require Plaintiffs to prove racial bias in the community or that political parties in the Town serve as 'proxies' for racism" (Pet. 129a).

The court evaluated Petitioners' contention in the larger political and historical context in the Town. After immersing itself in this fact intensive process it concluded:

> In evaluating all of the relevant facts as a whole, including the size of the Town, the absence of geographic subdistricts, the lack of access by blacks to the Republican Party slating process, the unfortunate use of racial appeals in political campaigns, the lack of responsiveness by the Town Board to the particularized needs of the black communities, and the stated desire by the Town government to cling to a monolithic, single-voice legislature for a heterogenous population consisting of many different communities and voices, I conclude that the black citizens' failure to elect representatives of their choice to the Town Board is not best explained by partisan politics. Rather, black citizens' inability to elect their preferred candidates is best explained by the fact that the political processes leading to elections and the slating of candidates for them are not equally open to the participation of blacks.

(Pet. 129a-130a).

Judge Gleeson held that the at-large election system violated Section 2 of the Voting Rights Act, and ordered defendants to submit a remedial plan dividing the Town into six single-member districts.

C. The District Court's Remedial Decision.

Petitioners submitted two alternative districting plans. The first was a two district plan under which black voters were placed into a single-member district and would elect one representative to the Town Board. The rest of the members of the Board would

be elected from a single multi-member district that *excluded* the black communities within the majority-minority district and included all of the white communities within the Town (Pet. 161a). The second was a six district plan that was essentially the plan proposed by Respondents at trial (Pet. 162a).

Finding the two district plan unconstitutional under the standards announced in *Shaw v. Reno*, 509 U.S. 630 (1993) ("Shaw I") and its progeny,[17] the court concluded:

> The sole basis for this extraordinary system — for this formal political division of the people in the Town of Hempstead — is race. There has been no attempt to justify if by reference to a single traditional districting principle. Although the Town Board makes passing reference to its belief that local government "operates better when elected officials must answer to the entire electorate," and to the preference in New York State for the "at-large system" of town government, . . . those principles obviously played no role in the proposed system. If the Town Board has its way, no member of the Town Board would "answer to the entire electorate," and none would be elected at-large.

(Pet. 148a) (footnotes omitted).

The court observed that

> [t]he segregation effected by the Town Board's two district plan is almost total. Ninety-seven percent of

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17. This Court has held that strict scrutiny applies to reapportionment plans that segregate voters solely on the basis of their race. *Shaw I*; *see also Miller v. Johnson*, 115 S. Ct. 2475 (1995); *Bush v. Vera*, 116 S.Ct. 1941 (1996); *Shaw v. Hunt*, 116 S. Ct. 1894 (1996). Under this line of cases, if it is demonstrated that race was the predominant factor in the creation of the plan, strict scrutiny applies, and if the plan is not narrowly tailored to serve a compelling state interest, the plan must be declared unconstitutional. *See Bush*, 116 S. Ct. at 1951.

> the black voters in the Town of Hempstead are placed in District 1, which has an overall population that is over 58 percent black. By contrast, District 2 (*i.e.*, the balance of the Town) is over 97 percent non-black.

(Pet. 148a, n.7). The court concluded that the two district plan could not survive the strict scrutiny test and rejected it (Pet. 155a), and it approved the six-district plan (Pet. 157a).

REASONS FOR DENYING THE WRIT

The chief defect in Petitioners' application is the representation that partisanship, as opposed to race, caused African-Americans to be excluded from effective political participation in Hempstead. This factual argument was soundly *rejected* by both the district court and the Second Circuit.

Judge Gleeson, following *Gingles* and its progeny, correctly ruled that evidence of partisanship is not dispositive of "legally significant white bloc voting"; rather, evidence of partisanship was properly considered as one relevant consideration in the "totality of circumstances" inquiry. With respect to that inquiry, the district court engaged in the requisite "searching practical evaluation of past and present reality." Its factual determination that the challenged at-large election system denied black residents of Hempstead an equal opportunity to nominate and elect candidates of their choice is fully supported by the record and is unimpeachable under the governing "clearly erroneous" standard. There is no disagreement amongst the Circuit Courts on the proper searching inquiry to be conducted and no court has ever adopted the bizarre argument Petitioners now proffer. At the remedy stage, the district court's rejection of the Petitioners' two-district plan was compelled, under strict scrutiny, by constitutional prohibitions against race-based gerrymandering.

I. The Clearly-Erroneous Standard Governs This Court's Review of The District Court's Factual Findings of Legally Significant White Bloc Voting And Minority Vote Dilution.

This Court has confirmed that the clearly-erroneous test of Fed. R. Civ. Proc. 52(a) is the governing standard for appellate review of a finding of vote dilution. *Gingles*, 478 U.S. at 78-80. The Voting Rights Act requires the trial court "to consider the totality of the circumstances and to determine, based upon a searching practical evaluation of the past and present reality, whether the political process is equally open to minority voters." *Gingles*, 478 U.S. at 79 (internal quotation marks and citations omitted). Acknowledging that "[t]his determination is peculiarly dependent upon the facts of each case, and requires an intensely local appraisal of the design and impact of the contested electoral mechanisms" (internal quotation marks and citations omitted), this Court instructed:

> [T]he application of the clearly-erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law.

Gingles, 478 U.S. at 79.

Here, the district court properly immersed itself in an "intensely local appraisal of the design and impact of" the at-large voting system employed in the Town.[18] Its evaluation of the social and historical conditions in the Town and its related factual findings were all amply supported by the evidence before it. The court's ultimate factual finding that the Town's at-large system interacted with these conditions to cause an inequality

18. This Court has highlighted the "special vantage point" held by a district court, and has specifically expressed a disinclination to overturning such findings that represent "a blend of history and an intensely local appraisal of the design and impact of [the challenged] district in light of past and present reality, political and otherwise." *White v. Regester*, 412 U.S. 755, 769-70 (1973).

in the opportunities enjoyed by African-American voters to elect their preferred representatives, was firmly secured by a proper application of the governing law.

II. The District Court Properly Evaluated The Alleged Impact of Partisanship in The Totality of The Circumstances, And Its Finding That Black Citizens' Inability to Elect Their Preferred Candidates Is Best Explained by The Fact That The Political Processes Leading to Elections And The Slating of Candidates Are Not Equally Open Is Amply Supported by The Record.

The premise undergirding Petitioners' argument is that white bloc voting and racial polarization in the Town are not "legally significant" because partisan politics, not racial bias, best explains the black community's inability to elect its preferred candidates. No matter how they twist and turn, they cannot escape the fact that this *factual* argument has been rejected by both the district court[19] and the Second Circuit. Their argument that evidence of partisanship *dispositively* defeats any claim of "legally significant white bloc voting" at the threshold and precludes a district court from conducting a searching overall vote dilution inquiry finds no basis in any case and, indeed, violates the statute, the 1982 Senate Report, this Court's decision in *Gingles* and the premise underlying every circuit court case Petitioners have cited.

Furthermore, the adoption of Petitioners' proffered radical rule — that the existence of partisanship automatically precludes any possibility of finding "legally significant white bloc voting"

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19. The district court specifically found,

> [i]n evaluating all of the relevant facts as a whole, . . . black citizens' failure to elect representatives of their choice to the Town Board is *not* best explained by partisan politics. Rather, black citizens' inability to elect their preferred candidates is best explained by the fact that the political processes leading to elections and the slating of candidates for them are not equally open to the participation of blacks.

(emphasis added) (Pet. 129a-130a).

— would defy this Court's *rejection* of "inflexible rules" such as this which "run counter to the textual command of § 2, that the presence or absence of a violation be assessed 'based on the totality of circumstances.' " *Johnson v. DeGrandy*, 512 U.S. 997 (1994), *citing* 42 U.S.C. § 1973(b).

Petitioners' approach to the issue of "legally significant white bloc voting" has already been rejected by this Court in *Gingles*. There, the majority of this Court *agreed* that *whether* white voters cast their votes as a bloc sufficiently to defeat minority preferred candidates is the question to be determined for the purpose of assessing a plaintiff's proof of the third *Gingles* factor. *Gingles*, 478 U.S. at 55. The question of *why* voters voted for or against a particular candidate was not relevant to the proof of "legally significant white bloc voting." *Gingles*, 478 U.S. at 100 (O'Connor, concurring).

In Part III-C of his opinion, Justice Brennan asserted that "the *reasons* black and white voters vote differently have no relevance to *the central inquiry* of § 2." *Gingles*, 478 U.S. at 63 (emphasis added).[20] He stated, "[i]t is the *difference* between the choices made by blacks and whites — not the reasons for that difference — that results in blacks having less opportunity than whites to elect their preferred representatives." *Id.* (emphasis in original) The Justices who disagreed with Justice Brennan's analysis notably *agreed* with him that the reasons for these different choices could *not* be utilized to rebut a threshold showing that the minority group is politically cohesive and has prospects for electoral success (*i.e.*, the second and third *Gingles* factors). They *disagreed* with his assertion that such evidence could never affect the *overall* vote dilution inquiry (*i.e.* the central or ultimate inquiry of Section 2).

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20. A majority of this Court agreed that the central or *ultimate* inquiry of Section 2 is whether, based upon the "totality of circumstances," the challenged electoral structure impairs the ability of black voters to participate equally in the political process and to elect their preferred representatives. *Gingles*, 478 U.S. at 47.

In her concurring opinion, Justice O'Connor characterized Part III-C of Justice Brennan's opinion as addressing the validity of relying upon statistical evidence in finding racially polarized voting. Significantly she wrote:

> Insofar as statistical evidence of divergent racial voting patterns is admitted solely to establish that the minority group is politically cohesive and to assess its prospects for electoral success, I *agree* that defendants *cannot rebut this showing* by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race, such as an underlying divergence in the interests of minority and white voters. I do not agree, however, that such evidence can never affect the *overall* vote dilution inquiry.

Gingles, 478 U.S. at 100 (emphasis added).

Justice O'Connor concluded that the "[*o*]*verall vote dilution* inquiry neither requires nor permits an arbitrary rule against consideration of all evidence concerning voting preferences other than statistical evidence of racial voting patterns." *Id.*, 478 U.S. at 100 (emphasis added). She agreed with Justice Brennan that statistical evidence of divergent racial voting patterns is sufficient to establish "legally significant white bloc voting," and that such a showing *cannot* be rebutted by reliance on evidence that suggests that the divergent voting patterns may be explained by non-racial considerations. However, Justice O'Connor maintained that the influence of such diverging interests could certainly affect the *ultimate* issue, in the totality of circumstances, of whether such bloc voting would consistently deprive the minority of the ability to elect their preferred representative. This is precisely how Judge Gleeson approached the issue (Pet. 123a-129a), and this is precisely how the various circuit courts have addressed the issue.

As the Second Circuit succinctly held in this case, citing *Gingles* and decisions from the First, Fourth, Seventh and Eleventh Circuits:

> We think the best reading of the several opinions in *Gingles*, however, is one that treats causation as irrelevant in the inquiry into the three *Gingles* preconditions, *see Gingles*, 478 U.S. at 62, 106 S.Ct. at 2772 (Brennan, J., plurality opinion) but relevant in the totality of circumstances inquiry, *see* 478 U.S. at 100, 106 S.Ct. at 2792 (O'Connor, J.), concurring in judgment) (agreeing that use of racial polarization data "solely" to prove *Gingles* second and third elements cannot be rebutted by "evidence that the divergent racial voting patterns may be explained in part by causes other than race," but disagreeing with plurality's claim "that such evidence can never affect the overall vote dilution inquiry."). *Lewis v Alamance County, N.C.*, 99 F.3d 600, 616 n.12 (4th Cir. 1996); *see also Milwaukee Branch of the NAACP v. Thompson*, 116 F.3d 1194, 1199 (7th Cir. 1997) (reasons why candidates preferred by black voters lost should be considered in totality of circumstances inquiry); *Vecinos De Barrio Uno v. City of Holyoke*, 72 F.3d 973, 983 (1st Cir. 1995) (non-racial reasons for divergent voting patterns to be considered under totality of circumstances test); *Nipper v. Smith*, 39 F.3d 1494, 1524 (11th Cir. 1994) (in order for plaintiff to prevail where defendant offers proof that voting patterns can best be explained by non-racial circumstances, showing must be made under totality of circumstances that minority group denied meaningful access to political process).

Pet. 30a-31a.

There is plainly agreement among the Circuit Courts on this issue.[21] The Fifth Circuit Court of Appeals *also agrees* that

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21. Recently, in *Sanchez v. State of Colorado*, 97 F.3d 1303, 1313 (10th Cir. 1996), the Tenth Circuit too agreed that,

> if the third Gingles' precondition asks whether whites vote

(Cont'd)

inquiries into the relevance of non-racial explanations for white-bloc voting, such as partisanship, necessarily involves a review of the totality of circumstances. *League of United Latin American Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 860 (5th Cir. 1993), *cert. denied*, 510 U.S. 1071 (1994) ("LULAC") ("[t]he bloc-voting inquiry, like the question whether the political processes are equally open, must rest upon a searching practical evaluation of the past and present reality" [internal quotation marks omitted]).

Petitioners' argument that *LULAC* stands for the proposition that mere evidence of partisanship precludes inquiry into other reasons for divergent voting patterns is precisely the opposite of what the Fifth Circuit held in that case. There, faced with evidence demonstrating that the majority Republican Party had "aggressively recruited minority lawyers to run on their ticket" (999 F.2d at 861), and finding no evidence of unresponsiveness on the part of elected officials (999 F.2d at 859), a majority of the judges of the Fifth Circuit concluded that "[t]he *record* before us contains *no evidence* that past or present discrimination has affected minorities' political access in any way." 999 F.2d at 853 (emphasis added). The Fifth Circuit also remarked, "[T]estimony shows that any eligible candidate could run as a Republican regardless of race. The plaintiff-intervenors testified themselves that they had been heavily lobbied by the Republican Party leadership to run on the Republican ticket." *LULAC*, 999 F.2d at 880.

It is eminently clear from the Fifth Circuit's *factual determination* that partisanship best explained plaintiffs'

(Cont'd)

> sufficiently as a block to enable them usually to defeat the minority candidate, it is asking how voters vote, not why voters voted that way. Indeed, the searching evaluation done in the totality of circumstances perhaps reveals the answer to the latter question. However, at the threshold, we are simply looking for proof of the correlation between the race of the voter and the defeat of the minorities' preferred candidate.

political losses, that the court reached this conclusion only after assessing *that entire record. See, LULAC*, 999 F.2d at 855 ("[i]t is difficult to see how the record in this case could possibly support a finding of liability"); 999 F.2d at 860 ("[w]e fully agree with the plaintiffs that the bloc voting inquiry, like the 'question whether the political processes are "equally open," ' must rest 'upon a searching practical evaluation of the "past and present reality." ' "); 999 F.2d at 861 ("[b]ecause the evidence in most instances unmistakably shows that divergent voting patterns among white and minority voters are best explained by partisan affiliation, we conclude that plaintiffs have failed to establish racial bloc voting in most, but not all, of the counties").

Petitioners' contention that this Court's decision in *Whitcomb v. Chavis*, 403 U.S. 124 (1971) is somehow dispositive of this case (Pet. 22-24), stems from their continued evasion of the facts. In *Whitcomb*, this Court rejected plaintiffs' contention that a challenged districting plan for the State of Indiana invidiously discriminated against them in violation of the Fourteenth Amendment. This Court stressed that the record contained *no evidence* or district court *findings* that plaintiff "ghetto residents had less opportunity than other Marion County residents to participate in the political processes and to elect legislators of their choice." *Whitcomb*, 403 U.S. at 149. Indeed, the record there demonstrated that Democrats, including "ghetto" residents, had not only been elected in one of five studied elections, but that the Republicans in Marion County, who won the other four elections, slated and elected representatives from the "ghetto" community. *Whitcomb*, 403 U.S. at 152. Significantly, Justice White indicated that, "there was no finding by the District Court that Republican legislators residing in the ghetto were not representative of the area or had failed properly to represent ghetto interests in the general assembly." *Whitcomb*, 403 U.S. at 152, n.32. Notably, 20 years later, writing in *Shaw v. Reno*, 113 S. Ct. 2816, 2835 (1993) (emphasis added), Justice White recalled, "In *Whitcomb v.*

Chavis . . . , we searched in vain for evidence that black voters 'had less opportunity than did other . . . residents to participate in the political processes and to elect legislators of their choice.' "

These facts, stand in stark contrast to the situation in Hempstead, where minority-preferred candidates have *never* been elected, where the Republican Party has *never* nominated any minority community resident for a seat on the Town Board, and where the district court found that the sole "black" Republican member of the Town Board, Curtis Fisher, has *not* represented or been sufficiently sensitive to the interests of black residents (Pet. 118a-123a).

III. The District Court Properly Found That Petitioners' Two-District Remedy Violated The Fourteenth Amendment.

Petitioners' contention that the district court improperly rejected their admittedly unusual two-district remedy as an impermissible racial gerrymander in violation of the principles set forth in *Shaw v. Reno*, 509 U.S. 630 (1993), is insupportable. Under the Petitioners' proposal, the Town was to be divided into two separate districts (Pet. 136a), and as the court observed, "[t]he segregation effected by the Town Board's two-district plan is almost total." (Pet. 148a, n.7).

Judge Gleeson appropriately analyzed the motivation behind the Town's creation of its segregationist two-district plan, as required by *Bush v. Vera*, 116 S. Ct. 1941, 1951 (1996), and concluded that, "The sole basis for this extraordinary system — for this formal political division of the people in the Town of Hempstead — is race. There has been no attempt to justify it by reference to a single traditional districting principle" (Pet. 148a).

Accordingly, the court concluded that "strict scrutiny must be applied to the two-district plan because race is not merely the predominant factor motivating the classification of the voters, it is the *only* factor" (Pet. 149a, emphasis in original). In light of its finding, the court considered whether the plan was narrowly tailored to meet a compelling state interest. While the

court concluded that remedying a Section 2 violation was a compelling state interest, the court decided that:

> The two-district plan clearly fails to meet this requirement. [A] majority-minority district can readily be created in the Town even if race is subordinated to the traditional districting principles of one-person, one-vote, compactness, and conformance with existing political geography. The plan plaintiffs proposed at trial accomplished that result, as does the six-district plan proposed as an alternative by the Town Board. In light of the ready availability of these remedies, there was no need to create the bizarre hybrid two-district electoral plan the Town Board proposed, and it is difficult to fathom why the Town Board would strain so hard to create such a divisive proposal. In any event, the unusual characteristics of the two-district plan defeat any claim that the proposed plan is narrowly tailored to remedy the Section 2 violation. I reject it as violative of the Fourteenth Amendment.

(Pet. 154a-155a, citation and footnote omitted)

The court stated that the two-district plan would "punish the black communities by isolating them and their elected representative" (Pet. 153a). Perhaps most troubling was Judge Gleeson's conclusion that:

> [T]he trial testimony leads me to conclude that it is *designed* to facilitate a concrete harm as well. Specifically, the creation of the unusual multi-member district for the remainder of the Town appears *designed* to enhance the ability of the Town Board to act as the Town Supervisor predicted it would act if plaintiffs prevailed in this case: parochially, in ways that will permit it to do the "wrong thing" politically with respect to the newly-created "zone."

(Pet. 153a, citation omitted, emphasis added). In light of the district court's careful application of the appropriate legal standard, Judge Gleeson properly rejected the two-district plan.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — EXCERPTS FROM THE MAY 1982 SENATE JUDICIARY COMMITTEE REPORT ON THE VOTING RIGHTS ACT AMENDMENTS OF 1982 (S. Rep. No. 417, 97th Cong., 2d Sess., at 28-30 [1982])

Following are the so-called Senate Factors provided in the Senate Judiciary Committee Report accompanying the 1982 amendments to Section 2 of the Voting Rights Act:

> Section 2 protects the right of minority voters to be free from election practices, procedures or methods, that deny them the same opportunity to participate in the political process as other citizens enjoy.
>
> If as a result of the challenged practice of structure, plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice, there is a violation of this Section. To establish a violation, plaintiffs could show a variety of factors, depending upon the kind of rule, practice, or procedure called into question.

Typical factors include:

1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. The extent to which voting in the elections of the state or political subdivision is racially polarized;

Appendix

3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. Whether political campaigns have been characterized by overt or subtle racial appeals;

7. The extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

1. Whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group. [FN116]

Appendix

2. Whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous. [FN117]

While these enumerate factors will often be the most relevant ones, in some cases, other factors will be indicative of the alleged dilution.

The cases demonstrate, and the committee intends that there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.

Supreme Court, U.S.
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JAN 6 2000
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No. 99-886

In The

Supreme Court of the United States

TOWN BOARD OF THE TOWN OF HEMPSTEAD, NEW YORK, *et al.*,

Petitioners,

v.

DOROTHY GOOSBY, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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13PP

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

City of Mobile v. Bolden, 446 U.S. 55 (1980) 7

Clarke v. City of Cincinnati, 40 F.3d 807 (6th Cir. 1994), *cert. denied*, 514 U.S. 1109 (1995) 4, 8

League of United Latin Am. Citizens, Council No. 4434 v. Clements, 999 F.2d 831 (5th Cir. 1993) (*en banc*), *cert. denied*, 510 U.S. 1071 (1994) 3, 4

Lewis v. Alamance County, 99 F.3d 600 (4th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997) 4, 9

Nipper v. Smith, 39 F.3d 1494 (11th Cir. 1994), *cert. denied*, 514 U.S. 1083 (1995) 2

Shaw v. Reno, 509 U.S. 630 (1993) 5, 7

Thornburg v. Gingles, 478 U.S. 30 (1986) 5, 6, 7, 8, 9

Uno v. City of Holyoke, 72 F.3d 973 (1st Cir. 1995) 2

Whitcomb v. Chavis, 403 U.S. 124 (1971) 7

White v. Regester, 412 U.S. 755 (1973) 7

CONSTITUTION, STATUTES AND RULES

42 U.S.C. § 1973 .....2, 5

Respondents' brief in opposition does not contest, and thus effectively concedes, that the Section 2 issue presented here is critically important and must be resolved prior to the next redistricting cycle. Nevertheless, in a vain effort to shield the Second Circuit's ruling from review, respondents seek to recast the purely legal questions presented as factual issues and also attempt to obscure the sharp split among the circuits on this issue by distorting, or simply ignoring, those decisions that conflict with the decision below. As three other circuits have properly held, an at-large electoral system cannot violate Section 2 absent a finding of racially-biased voting and adverse findings concerning other "Senate Report factors," unrelated to voting, cannot substitute for that missing finding. Thus, even accepting every factual finding by the lower court as unquestionably true, the judgment below cannot be reconciled with the other circuits or this Court's precedent. This is why the civil rights *amici* supporting respondents below said the legal questions presented in this case are "important issues" and urged the Second Circuit "to reject the Fifth Circuit's interpretation of the third *Gingles* prong." *Amicus* Brief of NAACP Legal Defense Fund at 2; *Amicus* Brief of NAACP at 1.

1. The legal issue presented in this case is whether an at-large voting system may violate Section 2 absent any finding that nonminority voting is attributable to racial concerns, rather than traditional, color-blind partisan considerations. We established in the petition that the First, Fifth and Eleventh Circuits directly hold that a finding of such racially-biased voting is an essential prerequisite to a Section 2 violation, while the decision below rejected such a rule and found a violation absent any evidence, much less any finding, of racially-biased voting patterns. In a feeble effort to deny the existence of this fundamental split among the lower federal courts, respondents attempt to distort the factual and legal basis of the decision below and the legal principle established in the other circuits. Specifically, respondents seem to suggest that (1) the Second Circuit somehow *sub silentio* agreed with the legal principle that color-blind partisan voting cannot violate Section 2, but factually found that Hempstead voters are motivated by race, rather than partisanship and that (2) the other circuits do not

require any finding of racially-biased voting as a prerequisite to a Section 2 violation. Both assertions are obviously false and cannot disguise the decision below's stark departure from the other circuits' legal resolution of this central Section 2 issue.

First, there is no evidence, much less any finding, that voting patterns in Hempstead are explained by race, or anything other than normal partisan politics. To be sure, as respondents correctly note, the district court found that the "*political* processes *leading* to elections and the [Republican] *slating* of candidates for them are not equally open to the participation of blacks." Brief in Opposition ("Opp.") 22 n.19 (quoting Appendix to Petition ("App.") 129a-130a) (emphases added). But, as the petition explained at length, three other circuits require a finding of racially-biased *voting* by the electorate; a finding of racial bias in *slating*, or other aspects of the nomination or political process used by private political parties, plainly does not suffice. There is no such finding of racially-biased voting here, nor could there be because it is undisputed that black candidates receive the same support from the electorate as their white counterparts. Thus, even assuming black Republican candidates received less support in slating from the Republican Party than whites, Hempstead's at-large voting system would not violate Section 2 in the First, Fifth or Eleventh Circuits because black candidates receive the *same* support from the *electorate*. 42 U.S.C. § 1973. In those circuits, the court must find that "the *voting community* is driven by racial bias" and plaintiffs "cannot prevail on a VRA § 2 claim if there is significantly probative evidence that whites *voted* as a block for reasons wholly unrelated to racial animus." *Nipper v. Smith*, 39 F.3d 1494, 1547 (11th Cir. 1994), *cert. denied*, 514 U.S. 1083 (1995), *Uno v. City of Holyoke*, 72 F.3d 973, 981 (1st Cir. 1995) (emphases added). But here plaintiffs did prevail even though it is undisputed that white voting was not "driven by racial bias," but by partisan concerns "unrelated to racial animus." The court below's legal error, then, is that it found a Section 2 violation even though the record *concededly* proved that "partisan affiliation, not race, best explains the divergent

voting patterns among minority and white citizens in the [jurisdiction]." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993) (*en banc*) ("*LULAC*"), *cert. denied*, 510 U.S. 1071 (1994).

In short, the court below invalidated the at-large system without making the finding of a racially-motivated electorate that is an essential requirement to invalidate such systems in three other circuits. Respondents cannot disguise or alter this stark reality by continually changing the subject to the entirely different question of whether the Republican Party was equally open to minorities in its slating process.

In the same vein, respondents devote the bulk of their Opposition to establishing that the First, Fifth and Eleventh Circuits consider the existence of racially-biased voting as part of the ultimate Section 2 vote dilution inquiry, rather than as part of the third *Gingles* precondition of "white bloc voting," necessary to establish a *prima facie* case. This is neither true nor a ground for reconciling the decision below with the legal principle established in the other circuits. First, as the very quote cited by *respondents* establishes, the Fifth Circuit's *en banc* decision in *LULAC* plainly holds that "plaintiffs have failed to establish racial bloc voting" – *i.e.*, the "third prerequisite of *Gingles*" – if "voting patterns among white and minority voters are best explained by partisan affiliation." Opp. 27 (quoting *LULAC*, 999 F.2d at 861). *See also* 999 F.2d at 892. This holding was repeated countless times in the *LULAC* opinion, as both the *LULAC* dissenting opinion and subsequent lower federal court decisions have expressly recognized.[1]

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[1] *See, e.g.*, 999 F.2d at 877 ("This is a failure to meet the threshold showing required by *Gingles*."); *id.* at 879 ("[T]he minority-preferred candidates were consistently defeated because they ran as members of the weaker of two partisan organizations. We are not persuaded that this is racial bloc voting as required by *Gingles*."); *id.* at 892 ("The plaintiffs have not established the third prerequisite of *Gingles*."); *id.* ("Therefore, plaintiffs have not met the third *Gingles* factor."); *id.* at 893 ("Plaintiffs have failed to meet the third prerequisite of *Gingles*."). *See also* 999 F.2d at 902 (King, J., dissenting) ("[T]he majority holds that to establish legally

Thus, the Fifth Circuit clearly holds that divergent voting patterns attributable to partisan affiliation do not constitute the "legally significant racial bloc voting" that plaintiffs must establish as a *Gingles* precondition.

Respondents point out that the *LULAC* court, like all conscientious appellate courts, looked at the "record" and said that the issue of racially-biased voting should "rest 'upon a searching practical evaluation of the past and present reality.' " Opp. 26-27 (quoting *LULAC*, 999 F.2d at 860, 861). While this is quite true, if the "searching" inquiry reveals that partisanship, rather than race, is the cause of divergent voting patterns, then plaintiffs' claim must be rejected because they have failed to establish the third prerequisite under *Gingles*. In the Second Circuit, in contrast, even if partisanship is *conceded* to cause divergent voting patterns, plaintiffs nevertheless have established the third *Gingles* precondition and the at-large system will nevertheless be invalidated if minorities are disproportionately members of the less-popular political party.

In short, the decision below cannot be reconciled with *LULAC* because the Second Circuit held that "the cause of white bloc voting is not relevant to a consideration of the *Gingles* preconditions." App. 30a. It also cannot be reconciled with the decisions of the First and Eleventh Circuits because those circuits also require a finding of racially-biased voting to invalidate at-large electoral schemes. The only difference is that they do not require that finding as part of the *Gingles prima facie* case, but only when the defendant alleges that partisan or other nonracial factors cause divergent voting patterns. Petition ("Pet.") 16-17. As established in the petition, and as respondents do not contest, the court below did not require a finding of such racially-biased voting, but expressly held that "neither the existence (or non-existence) of racial bias

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significant white bloc voting and racially polarized voting, minority plaintiffs must, at the very least, negate partisan politics as an explanatory factor for the consistent defeat of their preferred candidates."); *Clarke v. City of Cincinnati*, 40 F.3d 807, 813 n.2 (6th Cir. 1994), *cert. denied*, 514 U.S. 1109 (1995); *Lewis v. Alamance County*, 99 F.3d 600, 615 n.12 (4th Cir. 1996), *cert. denied*, 520 U.S. 1229 (1997).

in the community nor the strength of the correlation between partisan politics and divergent voting patterns can be dispositive in a Section 2 case." App. 124a. Rather, the court below relegated the issue of whether the electorate is color-blind to be merely one factor to be somehow considered in determining whether a Section 2 violation exists.

2. The petition explains at length that, absent race-conscious voting by nonminorities, an at-large system that fails to elect minority-preferred candidates does not "result" in discrimination "on account of race" or provide minority voters or candidates with "less opportunity" than similarly situated nonminorities. 42 U.S.C. § 1973. The petition further explains that interpreting Section 2 to require racially-drawn black majority districts absent such race-conscious voting violates equal protection rights recognized in *Shaw v. Reno*, 509 U.S. 630 (1993), and similar cases. Respondents provide absolutely no response to this constitutional argument and make no attempt to square the decision below with Section 2's language or legislative history, thus effectively conceding that their interpretation of Section 2 impermissibly requires rough proportional representation and, at a minimum, raises serious equal protection concerns. *Thornburg v. Gingles*, 478 U.S. 30, 84 (1986) (O'Connor, J., concurring).

In the face of this, however, respondents nonetheless maintain that the *Gingles* Court held that "racial bloc voting" and "vote dilution" analysis under Section 2 draws no distinction between an electorate that affirmatively discriminates against minority candidates because of their race and a color-blind electorate where all candidates are judged without regard to their race. In either instance, the at-large system "dilutes" minority voting strength if minorities have less electoral success than they would under a single-member districting scheme, without regard to what *causes* their relative lack of success. Opp. 23. While it is true that the *Gingles plurality* opinion seemed to endorse this method of "racial bloc voting" analysis, we previously established that Justice White expressly rejected it and Justice O'Connor (for herself and three other Justices) expressly concurred with Justice White's analysis. Pet. 22-23; 478 U.S. at 83 (White, J., concurring); *id.*

at 100 (O'Connor, J., concurring). Again, as is their wont, respondents simply ignore this dispositive point.

More generally, there is simply no basis for contending that Justice O'Connor's concurrence endorsed the Brennan plurality's view of "minority vote dilution" or "legally significant racial bloc voting." To the contrary, the concurring opinion expressly rejected Justice Brennan's "definition of minority voting strength and its test for vote dilution" precisely because it "results in the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups." 478 U.S. at 85 (O'Connor, J., concurring). *See id.* at 97. Indeed, Justice O'Connor's concurrence specifically criticized Justice Brennan's opinion because it *equated* "legally significant bloc voting by the racial majority" with "the extent of the racial minority's electoral success." *Id.* at 92. Under this definition, the concurrence noted, there will *always* be "legally significant white bloc voting" any time minorities do not have proportional representation or, more precisely, representation equivalent to that which they would achieve in a single-member districting scheme:

> If the minority can prove that it could constitute a majority in a single-member district, that it supported certain candidates and that those candidates have not usually been elected, then a finding that there is "legally significant white bloc voting" will necessarily follow. Otherwise, by definition, those candidates would usually have won rather than lost.

Id. This is unacceptable because this "test for measuring minority voting strength and its test for vote dilution, operating in tandem, come closer to an absolute requirement of proportional representation than Congress intended when it codified the results test in § 2." *Id.* at 94.

Like the *Gingles* plurality, the court below would similarly find "white bloc voting" and "vote dilution" any time a cohesive, geographically compact minority group would have more representation in a single-member scheme than it has achieved in an at-large system – even if its at-large losses are attributable to normal partisan politics that equally affect candidates

and voters of all races. As both *Gingles* concurrences pointed out, any such definition of "white bloc voting" is unacceptable because, contrary to *Whitcomb* and the language of Section 2, it would preferentially immunize minority voters from normal political vicissitudes and guarantee them proportional representation, rather than an opportunity equal to similarly situated nonminorities. 478 U.S. at 83 (White, J., concurring); 478 U.S. at 93, 98 (O'Connor, J., concurring). Under *Whitcomb*, however, it is not enough to find that minorities are "losing elections," the Court must find that there is a "built-in bias against . . . Negroes." *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971). *See also Shaw*, 509 U.S. at 661 (White, J., dissenting) (*Whitcomb* and *White v. Regester*, 412 U.S. 755 (1973) require "discrimination in the polity," not "mere suffering at the polls."). Thus, both *Gingles* concurrences require courts to analyze the *reasons* for the failure of minority supported candidates, in order to determine whether it reflects a built-in bias facilitated by the at-large system, or simply the nondiscriminatory operation of the normal democratic process.[2] 478 U.S. at

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[2] To be sure, Justice O'Connor's concurring opinion was not precise about *when* Section 2 courts should analyze the causes of divergent voting patterns within the "racial bloc voting" litigation framework established by Justice Brennan's opinion. (This is hardly surprising since the concurring opinion rejected as unsound the basic thrust of Justice Brennan's vote dilution and racial bloc voting analysis.) As pointed out in the petition, this ambiguity has been noted by lower courts and led to disagreement about whether nonracial explanations for divergent voting patterns should be analyzed as part of the *Gingles* preconditions or as part of the "overall vote dilution inquiry." *Gingles*, 478 U.S. at 101 (O'Connor, J., concurring); Pet. 17. Resolving this confusion is an additional reason for granting the petition but, contrary to respondents' suggestion, hardly lends support to the court below's determination that a Section 2 violation may be found without *ever* engaging in this "*vote* dilution inquiry." Again, at some point, the court must determine whether the minority "community's lack of success at the polls was the result of partisan politics, [or] racial vote dilution." *City of Mobile v. Bolden*, 446 U.S. 55, 109 (1980) (Marshall, J., dissenting). Even assuming *arguendo* that this causation inquiry may be done after the *prima facie* case is established, the court below erred by finding that the at-large system somehow caused "racial vote dilution"

83 (White, J., concurring); 478 U.S. at 100 (O'Connor, J., concurring).

Moreover, under normal English usage, *Gingles*' discussion of "white bloc voting" cannot plausibly encompass *partisan* bloc voting where one overwhelmingly white group defeats another overwhelmingly white group for wholly nonracial reasons. In Hempstead, for example, the purported "white bloc voting" consists of a 96% white group (Republicans) defeating an 89% white group (Democrats). It is simply not reasonable to label such standard partisan competition between two overwhelmingly white groups as "white bloc voting" against "minorities" where, as here, minority candidates are not subject to some disadvantage different than white colleagues of the same party.

In addition, equating minority *partisan* defeats with impermissible vote dilution creates a situation where localities' Section 2 liability varies depending on the partisan affiliation of its voters. As we noted in the petition, and respondents do not dispute, a predominantly Democratic town otherwise *identical* to Hempstead would face no potential Section 2 liability under the decision below because minorities could elect their preferred Democratic candidates. Indeed, the lower court's finding that racial bloc voting exists absent any differential treatment of black candidates has the perverse result of immunizing predominantly Democratic jurisdictions from Section 2 liability even where white voters *do* discriminate against black candidates. As the Sixth Circuit has explained, "[w]hen white bloc voting is 'targeted' against black candidates, . . . [but] black voters nevertheless are able to elect many or most of their preferred candidates who are white, a court that refuses to consider candidate race will be unable to conclude that 'the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.' " *Clarke*, 40 F.3d 807 at 812 (quoting *Gingles*, 478 U.S. at 51).

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without ever finding that minority electoral defeats were attributable to something other than normal, color-blind "partisan politics."

Thus, the lower courts which have followed the *Gingles* plurality's, and the Second Circuit's, view that the race of the candidate is irrelevant have overturned findings of racial bloc voting precisely because *white* candidates preferred by black voters have been successful. *See Lewis*, 99 F.3d at 615. Needless to say, Section 2 should not be converted into a vehicle for partisan favoritism, nor a statute which penalizes a color-blind electorate because they are predominantly Republican and simultaneously immunizes a racially-biased electorate because they are predominantly Democratic.

Finally, respondents complain that requiring a showing of racially-biased voting is an impermissible "inflexible rule." Opp. 23. But common sense and *Gingles* require that proving improper *voting* is, indeed, an inflexible prerequisite to establishing the illegality of an at-large *voting* system under the *Voting* Rights Act. If color-blind partisan voting is not "legally significant white bloc voting," or does not result in impermissible vote dilution, then the challenged electoral system here cannot "result" in discrimination on account of race. Consequently, there is no basis for invalidating that system on the basis of other slating or employment practices unrelated to the challenged at-large scheme and which will remain wholly unaffected by elimination of the at-large system. Respondents' obsessive focus on these tangential issues is a fairly transparent attempt to divert attention from the fact that the only flaw they can identify in the challenged *at-large system* is that it did not produce the proportional, partisan representation respondents desire.

3. In response to our contention that the district court exceeded the fundamental limits on its remedial authority by invalidating portions of the at-large system that complied with federal law, respondents simply repeat the mantra of the district court that the Board "proposed" a "two-district system" because of racial animus. But, again, the relevant inquiry is not the intent of the current Board, but the intent of the body that *enacted* the at-large system being struck down. As noted, the court below found that the Town had not adopted the at-large system in 1934 for racially discriminatory purposes and respondents do not suggest otherwise. This should have ended

the inquiry since the district court was without power to invalidate any aspect of the system that was enacted for a constitutionally legitimate purpose and that did not itself violate Section 2. Federal courts cannot evade these bedrock remedial limits, and invalidate local enactments concededly consistent with federal law, by simply asserting that an otherwise valid law is somehow "tainted" because it is now supported by alleged discriminators.

In any event, the lower court's finding of discriminatory purpose is internally contradictory and irrational. The black majority district created by the district court was obviously not intended to discriminate against black voters and it is just as "segregated" and "subject to retaliation" if it is surrounded by five overwhelmingly white single-member districts than if it is surrounded by one predominantly white district. There is thus no coherent basis for finding that the black majority district is perfectly permissible if adjacent to the single-member districts preferred by the district court, but somehow "racist" if adjacent to the multi-member district that has always been used in Hempstead and virtually every other town in New York.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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